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Supreme Court of the United States

OCTOBER TERM, 1961

No. 331

THE SHELL PETROLEUM CO., LTD.,
as owner of the m/s LEMBULUS,
Petitioner,

—against—

CHARLES PESCHKEN,
Respondent,

and

CANOLIUS V. HINES and
FRED W. BENTS

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

ROBERT M. JULIAN,
Counsel for Petitioner,
80 Broad Street,
New York 4, N. Y.

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Supreme Court of the United States

OCTOBER TERM, 1961

THE SHELL PETROLEUM CO., LTD.,
as owner of the m/s LEMBULUS,
Petitioner,

—against—

CHARLES PESCHKEN,
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and

CANOLIUS V. HINES and
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No. .....

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

To the Honorable, the Chief Justice and the Associate Justices of the Supreme Court of the United States:

Petitioner prays that a writ of certiorari issue to the United States Court of Appeals for the Third Circuit to review the judgment of that Court filed on May 23, 1961, reversing the judgment of the District Court in favor of petitioner and remanding the case to the District Court with directions to enter judgment in favor of respondent.

Opinions of the Courts Below

The opinion of the District Court is reported at 184 F. Supp. 950 (D. C. N. J., 1960) and is reproduced in Appendix A. The opinion of the District Court denying motion

for judgment in favor of respondent notwithstanding the Court's opinion filed on June 24, 1960, is not officially reported but is reproduced in Appendix B. The opinion of the Court of Appeals is reported at 290 F. 2d 685 (3 Cir., 1961) and is reproduced in Appendix C.

Jurisdiction

The judgment of the Court of Appeals was filed on May 23, 1961.

Jurisdiction of this Court is invoked under Title 28 U. S. C. 1254 (1).

Questions Presented

1. Whether the rule in the *Pennsylvania* case, 86 U. S. 125, applies to violations of the Bridge Act of 1906 in (a) maintaining and operating a defective bridge contrary to the provisions of 33 U. S. C. 494, 33 U. S. C. 499, 33 U. S. C. 512 and (b) in invariably sounding the wrong signal, contrary to the provisions of 33 C. F. R. 203.200 (a), (d) and (e), to every vessel approaching the bridge.

2. Whether (a) maintaining and operating a defective bridge and (b) customary disregard of the Corps of Engineers' regulations as to signals constitutes an unlawful obstruction to navigation.

3. Whether a bridge tender's act of customarily violating the provisions of 33 C. F. R. 203.200 (a), (d) and (e), by sounding the wrong signal to every vessel that approaches the bridge, can be used to avoid or evade regulations designed to protect the rights of public navigation, and whether the bridge tender's act can be used to transform the ancient and well established paramount right of

public navigation into a paramount right to maintain an obstruction to public navigation.

4. Whether the Circuit Court, in completely reversing the District Court, was correct in not applying the principles enunciated by other Circuit Courts in *Clement* v. *Metropolitan West Side El. R. Co.*, 123 Fed. 271 (7 Cir., 1903), *The Majestic*, 80 F. 2d 879 (4 Cir., 1936) and *Munroe* v. *City of Chicago*, 194 Fed. 936 (7 Cir., 1912), cert. den., 229 U. S. 609, and a line of cases predicated thereon, which decisions were cited and followed by the District Court.

5. Whether the Court of Appeals was correct in its interpretation of a two-blast signal as a "warning" and that no other signal was necessary to give proper warning of a potential electrical failure, a holding contrary to the holding in *Circle Line Sightseeing Yachts* v. *City of New York*, 283 F. 2d 811 (2 Cir., 1960), and whether the Circuit Court, in reversing the District Court as a matter of law, was in reality upsetting findings of fact made by the District Court which findings were amply supported by the evidence.

Regulation Involved

33 C. F. R. 203.200 (a), (d) and (e)

§ 203.200 *Newark Bay, Passaic and Hackensack Rivers, and their navigable tributaries; General Regulations.* (a) The draws shall be opened promptly, upon signal, for the passage of vessels during the day or night, except as prescribed in paragraphs (b), (c), or (f) of this section.

* * *

(d) When a vessel approaches within signaling distance of a bridge for passage, the master thereof shall signify his intention by three blasts of a whistle or horn. For those

bascule bridges that have two separate and distinct drawspans the approaching vessel shall signal for an opening of the bridge in the customary manner by three blasts of a whistle or horn, and this shall be followed after a short interval with one blast, if it is desired that the drawspan on the starboard hand as the vessel approaches be opened, or by two blasts if it is desired that the one on the port hand be opened. The signal of the craft shall be immediately answered by the tender or operator of the bridge. If the draw is ready to be immediately opened, the answer shall be three blasts of a whistle or horn from the bridge. In case of delay in opening the draw, as is provided for in this section, or as may be necessary by accident to the machinery or other contingency, the signal from the vessel shall be answered by two long blasts of a whistle or horn from the bridge. In all cases when delay signals have been given, a signal of three blasts of a whistle or horn shall be given as soon as it is possible to open the draw.

(e) Upon hearing or perceiving the signals prescribed, the tenders or operators of a drawbridge, except as provided in paragraphs (b), (c) and (f) of this section, shall at once open the draw signaled for so as to allow the prompt passage of any vessel or craft: *Provided,* That the bridge may not be opened when there is a train, wagon, or vehicle at the time passing over said drawspan, or a train approaching so closely that it cannot be safely stopped before reaching the bridge, but it shall be opened as soon as the drawspan can be cleared. In case the opening of the draw will be delayed under the provisions of paragraph (c) of this section the tug stationed at the draw shall immediately go to the assistance of the vessel.

Statutes Involved

Bridge Act of 1906

33 U. S. C. 494; 33 U. S. C. 499; 33 U. S. C. 512

§ 494. Obstruction of navigation; alterations and removals; lights and signals; draws; tolls.

No bridge erected or maintained under the provisions of sections 491—498 of this title, shall at any time unreasonably obstruct the free navigation of the waters over which it is constructed, * * *

* * *

§ 499. Regulations for drawbridges; penalties for violation; enforcement.

It shall be the duty of all persons owning, operating, and tending the drawbridges built prior to August 18, 1894, or which may thereafter be built across the navigable rivers and other waters of the United States, to open, or cause to be opened, the draws of such bridges under such rules and regulations as in the opinion of the Secretary of the Army the public interests require to govern the opening of drawbridges for the passage of vessels and other water crafts, and such rules and regulations, when so made and published, shall have the force of law. * * *

* * *

§ 512. Obstruction of navigation.

No bridge shall at any time unreasonably obstruct the free navigation of any navigable waters of the United States. (June 21, 1940, ch. 409, § 2, 54 Stat. 498.)

* * *

Statement of the Case

This is a proceeding in admiralty which came on for trial before Hon. Reynier J. Wortendyke, Jr. in the United States District Court for the District of New Jersey on the 2nd, 3rd, 4th and 9th days of May, 1960. The parties were heard upon their respective pleadings and proofs and their cases were briefed and submitted to the Court which, after due deliberation thereon, filed its written opinion on June 24, 1960, holding respondent Charles Peschken liable for damages sustained on December 20, 1957, by petitioner's vessel, the m/s LEMBULUS.

Respondent thereafter moved the Court for judgment in his favor notwithstanding the Court's opinion, for an order "setting aside the verdict" and for a new trial. The motion was heard on September 26, 1960, and the Court's opinion denying the motion was filed on October 26, 1960. An interlocutory decree was filed on November 3, 1960, granting judgment in favor of petitioner and appointing a commissioner to ascertain damages.

Respondent appealed to the United States Court of Appeals for the Third Circuit. The appeal was argued on May 2, 1961. The Court of Appeals' opinion was filed on May 23, 1961, reversing the District Court and remanding the case with directions to enter judgment in favor of the respondent.

It should be noted at the outset that the Court of Appeals has loosely and incorrectly labeled a customary two-blast signal from the bridge as a "warning signal" (4c).* That signal is referred to in the Engineers' regulations as a "delay signal" (2f). The warning signal for Lincoln Highway Bridge is prescribed by the New Jersey State Highway Department and consists of two blasts to

*All references unless otherwise noted are to petitioners' appendix, attached hereto.

be repeated at intervals (Exh. P 13c, 1f), and this warning signal was never given. Furthermore, the State of New Jersey's regulations,* rule 3, requires three blasts to be given when the span *starts* to rise (Exh. P 13c, 1f), which is consistent with the Engineers' regulation.

A recent case involving the Madison Avenue Bridge, New York, N. Y. illustrates an entirely different application of the same type of whistle signals. *Circle Line Sightseeing Yachts* v. *City of New York*, 283 F. 2d 811 (2 Cir., 1960). The bridge in that case is governed by 33 C. F. R. 160. Paragraph (d) provides for whistle signals using the same two and three blasts signals made applicable to the Hackensack River Bridge by 33 C. F. R. 200 (d).

A sightseeing yacht, with hundreds of persons aboard, was approaching the bridge and expected to pass under the bridge in its usual fashion. The regulations required the Sightseer VIII to sound a three blast signal indicating her intention to pass. However, a tug had already signaled the bridge and the bridge was about to be opened. The Sightseer VIII could safely pass under the bridge while closed, but not while the bridge was opening because the act of opening the bridge caused certain objects on the bridge to project in such a manner as to obstruct passage.

In that situation a two blast reply from the bridge would not be a warning signal at all. In fact, it would be tantamount to an invitation to the Sightseer VIII to proceed because the signal would indicate that the bridge was closed and, therefore, the vessel could pass safely under the closed bridge. The Court of Appeals held that some-

*Although two written requests were made, the Office of the Attorney General of the State of New Jersey, who represents the respondent, has not produced Exhibit P-5 for identification, which is a book of Rules and Regulations of the New Jersey Highway Department governing drawbridges, and therefore the Rules themselves cannot be reproduced in the appendix. A photograph however of five of said rules is reproduced in appendix F.

thing other than the two or three blast signal should have been devised as a warning signal.

The State of New Jersey recognized that the two-blast signal, by itself, was not a warning and the State supplemented the regulations by adding a warning signal, namely, that the two blast signal was to be repeated at intervals.

The State of New Jersey also recognizes that a vessel can properly proceed towards the Hackensack River bridge while the span is in upward motion. Rule 3 clearly states (Exh. P 13c, 1f): "On vertical lift bridges, three blasts of the siren are to be given * * * when the span starts to rise, and the operator shall *continue to raise the span until the boat enters the draw* * * *."

Furthermore, as will be discussed in cases cited below, the Fourth, Sixth and Seventh Circuits hold that a vessel may proceed towards a bridge exhibiting a red light anticipating that the bridge would be opened in sufficient time for safe passage.

The Court of Appeals also characterizes (3c) a two-blast signal as a "command" which was allegedly "disobeyed" by the LEMBULUS. The only command to the LEMBULUS contained in 33 C. F. R. 203.200 (d) is that she shall give a three blast signal upon approaching the bridge and that command was complied with. The LEMBULUS did not disobey any command. To the contrary, it was the respondent who "disobeyed" a command in that he customarily gave a two blast signal regardless of whether the bridge could or could not open.

It appears that in considering the LEMBULUS case, the Third Circuit's basic assumption that a two blast signal is an absolute warning and a directive to the LEMBULUS not to proceed, so colored the Court's approach to the appeal that it either could not or would not consider any other factors such as whether the vessel was capable of being physically stopped dead in the water immediately after receipt of the signal; whether those aboard the LEMBULUS had done

all they could reasonably do to both avoid the collision and also avoid running aground under prevailing weather conditions by having placing her engines on slow ahead, dead slow ahead and stop; whether the vessel was legally required to take off all headway; whether the LEMBULUS's rights of navigation had been encroached upon and whether the *Pennsylvania* rule applies to bridges.

It is to be noted that the Circuit Court made no reference at all to whether the *Pennsylvania* rule applies to infractions of law by bridges or bridge tenders. The only reference by the Court of Appeals related to whether it would apply the *Pennsylvania* rule to the vessel.

It also seems strange indeed that the Circuit Court did not cite or discuss any cases involving collisions between bridges and ships. The Circuit Court stated that the cases cited by the District Court could be distinguished, but the Circuit Court made not the slightest effort to do so. If the Court of Appeals had discussed the authorities cited by the District Court, and in fairness we think it should have, then we believe that the discussion would have invariably lead to a consideration of the rights of navigation versus the questionable right to maintain and operate a defective bridge.

Facts

The LEMBULUS, a motor tanker 446 feet 2 inches length, 54 feet 7 inches in breadth, 25 feet 7½ inches loaded draft and 6,503 gross tons,* arrived at Sewaren, New Jersey, on December 16th, 1957, with a full cargo of roofing asphalt from Curacao, Dutch West Indies. After discharging some asphalt to lighten the vessel for navigation up the Hackensack River, she proceeded to Kopper's Wharf, Kearney Point, New Jersey where the balance of cargo was discharged. Discharging was com-

*Data taken from Lloyd's Registry.

pleted on December 20, 1957, following which the vessel ballasted and prepared for her return trip to Curacao. Captain John Bassett, a Moran Towing Company Docking Master and Harbor Pilot, boarded the LEMBULUS to pilot her down the Hackensack River.

The vessel's draft was 13' 00" forward and 17' 00" aft. Fresh to strong squally southeasterly winds prevailed with intermittent rain showers. The voyage down the Hackensack River was uneventful until just prior to passage under the Lincoln Highway Bridge. On passing under City Bridge (also referred to as the Whitpen Bridge) at 1546, Captain Bassett signaled the bridge to open. The Lincoln Highway Bridge in turn acknowledged the LEMBULUS's signal and, in fact, commenced to rise. Captain Hawkins, Master of the LEMBULUS, testified (Exh. P 10, 2i) that the bridge continued:

> "* * * to rise and everything seemed to be proceeding normally. At 1555 hours it was noticed that the bridge had stopped rising and a movement of Dead Slow Ahead which had just been made was immediately followed by, Stop. At 1556 hours the vessel was in an impossible position right in the approach to the bridge before we began to have doubts of the masts clearing, and Full Speed Astern was rung on the engines in an an attempt to take the way off. This movement was followed by, Stop (not recorded in the Bridge Movement Book), and immediately afterwards by, Emergency Full Speed Astern. The foretopmast hit the bridge at this time and a few moments later the maintopmast hit too. After the foretopmast hit, the bridge resumed rising and continued to apparently rise to the fully lifted position after we had passed through. At 1603 it was noted that the bridge had been fully lowered to the closed position. The foretopmast hit the bridge about six feet below the truck and the maintopmast about four inches below the truck. These figures were quoted in the Official Log Book Entry, made after the accident but, when

> the masts were removed in the repair yard the measurements were found to be nine feet ten inches and six inches respectively."

Captain Hawkins continued in his report, almost intuitively for he could have no knowledge of what took place in the control room of the highway bridge, that:

> "* * * Regarding the stop in the rising movement of the bridge, it may be that there was some temporary mechanical fault in the lifting mechanism but, at no time did the bridge operators give any indication that there was anything amiss. The bridge is fitted with a warning whistle for such emergencies."

Repairs were effected at the Bethlehem Steel Company's yard in Staten Island after which the LEMBULUS resumed her voyage to Curacao on December 23, 1957.

Libelant filed a libel against the respondent* to recover damages resulting from his negligence and breach of a statutory obligation under the Bridge Act of 1906, and Corps of Engineers' regulations adopted pursuant thereto, in failing to raise the Lincoln Highway Bridge high enough, soon enough for safe passage of the LEMBULUS and without warning to the vessel.

The bridge tender testified at the trial that, regardless of the Engineers' or the State Highway Department's regulations governing the operation of bridges, he always sounds a two blast signal when he starts to raise the span rather than the three blast signal required by law. Respondent was asked, with respect to the fact that he invariably

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*Suit was also filed against two other bridge personnel as a precautionary measure but at the conclusion of the trial petitioner suggested to the Court that, because those two respondents did not operate the controls and were not responsible for giving signals, "an honest reading of the evidence does not seem to warrant a finding of liability" on their part. The libel was accordingly dismissed as to them.

replies with two blasts to a vessel's signal of three blasts (20h):

> "Q. And you testified that, in fact, you do not observe that regulation as a matter of course?
> A. That's right."

Respondent is not alone in his attitude toward answering all vessels with a two blast signal regardless of whether the span can be raised or not. Perhaps his attitude derives from a general attitude in the New York-New Jersey area. For instance, the "Departmental Rules on Openings" of bridges operated by the City of New York are prefaced with the comment (1e) that "These rules are in conformity with the regulations prescribed by the Department of the Army, for the draw bridges in this section" and provides that:

> "All call signals for openings shall be answered promptly by the bridge by 2 long distinct blasts."*

Whatever the reason may have been for respondent's disregard of the regulations, the fact remains that he invariably replied to a vessel's call signal with two blasts.

The District Court stated (17a):

> "* * * I find that by commencing the raising of the drawspan immediately following his 'warning' signal, the physical raising of the bridge countered the effect of such warning, and served as an invitation to the vessel to proceed. See *Clement* and *The Kard,* supra. I can, therefore, find no basis for concluding that the vessel contributed in bringing about the collision, and am unable to relieve the draw bridge operator of responsibility for the occurrence."

It should be noted that the District Court found as a fact that the reduced speed of the LEMBULUS did not contribute to the accident and that the situation appeared

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*Cf. *Southern Transp. Co.* v. *City of New York,* 98 F. Supp. 967 (S. D. N. Y., 1950) where at page 969 the court said such signal is "contrary to the regulations of the War Department."

normal to those aboard said vessel (3b). These findings were amply supported by the evidence.

Captain Walfrid Waxin, master of the tug Cathleen Moran, was in a good position, astern of the LEMBULUS, to observe the bridge as it went up. Captain Waxin testified (13h):

> "I saw the bridge start to rise to what appeared to me to be in the usual fashion of bridges rising. Then to slow down to such an extent that it was hard to tell whether the bridge was still rising or had stopped."

With respect to the LEMBULUS's speed, Captain Waxin testified (14h):

> "* * * it (the LEMBULUS) seemed to me to be moving very slowly, but I wouldn't guess at any actual speed."

Captain Hawkins, master of the LEMBULUS, testified that the LEMBULUS was approximately one ship length away from the bridge abutment when the span suddenly stopped rising, and prior to that time the span had been moving upward continuously from the time it first started to move until it stopped (8h).

While the situation appeared to be and was normal to those aboard the LEMBULUS, the bridge was in fact defective in that it was being operated while subject to sudden power failure. Respondent and a Mr. Jerry Iannaccone, the District Electrical Supervisor, "decided" to operate the bridge until the trouble was located. The defect was not reported to the Coast Guard for publication in Notice to Mariners (19h) and was only verbally reported to Mr. Iannaccone's superior. The difficulty was subsequently located in the control mechanism. The bridge has a leveling mechanism to keep the span level as it rises, and if the span became sufficiently out-of-level the mechanism automatically stops the span from rising further (18h).

Respondent, with actual knowledge that the span was subject to sudden stoppage while rising, testified that the procedure he followed was "normal in every respect" and there was nothing "abnormal" (16b) about it.

Stated in other words, the Lincoln Highway Bridge operators did nothing, absolutely nothing out of the ordinary—upon receipt of the LEMBULUS's signal—to advise or warn of anything unusual.

The District Court summed up its findings (2b-3b):

> "The continued use of the defective draw span elevating mechanism by the New Jersey State Highway Department was negligent on its part, and the knowledge of the persistence of that defect had been brought home to the bridge operator and the likelihood of a slow-up or stoppage in the opening of the draw was apparent to him. There is no evidence that the master of the vessel or her pilot had knowledge either of the defect or of the regulations adopted by the Highway Department with regard to the giving of warning signals, and therefore the vessel was entitled to rely upon the regulations promulgated by the Secretary of the Army, from which I have quoted in my filed opinion. Assuming as true the bridge operator's testimony that he gave a two-blast signal in response to the three blasts from the vessel, the commencement of the opening of the draw almost immediately thereafter and its obvious continuance, without further warning signal until the vessel was so close as to be unable to stop her forward movement, constitutes, in my opinion, negligence on the part of the bridge operator which was solely responsible for the collision complained of. In sum, the commencement of the opening of the draw so promptly after the two-blast signal under the weather conditions which existed at the time, coupled with the continued rise of the draw span without further warning signals until collision was inevitable, constituted a reliable invitation on the part of the bridge operator to those in charge of the vessel's navigation to proceed and to expect

> that when the vessel entered the draw the span would have reached an elevation permitting her masts to pass beneath it without contact. I do not find that the vessel's speed played any part in bringing about the collision."

The weather conditions to which the District Court referred are:

> "The wind was fresh to strong from the southeast, and squally, with intermittent rain showers, and there was an incoming tide." (4a)

As heretofore noted, the ship was in ballast—i.e.—riding high in the water and subject to the wind.

The width of the channel, as distinguished from the width of the river, is about 400 feet at the approaches to the bridge (Exh. P 2, 1j), which is less than a shiplength.

The Court of Appeals, ignoring the realities of the situation and the lower Court's findings of fact, reversed the District Court *en toto* and directed entry of judgment in favor of respondent.

REASONS FOR GRANTING THE WRIT

1. The decision by the Court of Appeals for the Third Circuit is in conflict with a decision by the Court of Appeals for the Fourth Circuit in *The Majestic*, 80 F. (2d) 379 (4 Cir., 1936) and is in conflict with the leading decision on this subject by the Court of Appeals for the Seventh Circuit in *Clement* v. *Metropolitan West Side El. Ry. Co.*, 123 Fed 271 (7 Cir., 1903) and *Monroe* v. *City of Chicago*, 191 Fed. 936 (7 Cir., 1912), cert. den. 229 U. S. 609. It also conflicts with the decision of the Sixth Circuit in *City of Cleveland* v. *Melver*, 109 F. 2d 69 (6 Cir., 1940).

The Court of Appeals' decision in this case was based solely on the exchange of whistle signals. After referring to the fact that the LEMBELUS gave a proper signal to the bridge indicating her intention to pass, the Court said (2c):

> "* * * This signal was answered by two blasts from the bridge. It may be that this two-blast signal was repeated by the bridge but the court made no finding to this effect and whether a second two-blast signal was given is not material to our determination of this case. At the time the bridge answered the ship with the two-blast signal those in charge immediately began the process of opening the draw. No one from the bridge gave a three-blast signal which would have indicated to the ship that she could come ahead. * * *"

and repeated the substance of the foregoing (4c):

> "* * * Peschken, operating the Lincoln Highway Bridge, did give the warning signal. Perhaps he gave it twice*. And no three-blast 'come ahead' was given. The ship is clearly at fault. * * *"†

The Court of Appeals thus predicates its holding the LEMBULUS entirely and solely at fault upon proceeding towards the bridge, regardless of any other factor considered by the District Court, after the bridge gave a single two blast signal and immediately commenced rising the span. That holding is entirely *contra* to the decision in the *Majestic,* 80 F. (2d) 879. In the *Majestic* case a tug was approaching a bridge and gave a signal that it wished to pass through the draw. At that time a red light was showing on the bridge. The red light remained fixed as the tug approached the bridge. It appears that the tug could have been held in check waiting for the light on the bridge to turn green but, relying on the custom of the bridge, the tug proceeded. It also appeared that the bridge

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*There is no finding by the District Court that those aboard the LEMBULUS heard a two-blast "warning" signal and certainly no finding that a second signal was sounded to or heard by those aboard the vessel.

†No authorities are cited for this proposition and not one single ship-bridge collision case was discussed.

sounded a one blast signal intended as a warning to pedestrians that the span was about to be lifted, and that the tug master probably understood the meaning of the signal.

The Army Engineers' regulations governing the operation of that bridge provided that when the bridge exhibited a red light vessels were to stop and tie up before reaching the bridge. Vessels could proceed when the bridge showed a green light.

The light on the bridge was at all times red and a green light was never shown.

The District Court held that the accident was caused solely by the bridge tender's negligence and the Court of Appeals concurred.

In the instant case the LEMBULUS did not have the same option as the tug in the *Majestic* case, because the LEMBULUS could not tie up or anchor and, furthermore, there was a strong wind blowing across the channel.

The tug master in the *Majestic* case heard a signal, although not a navigational signal, by the bridge tender to pedestrians indicating that the span was about to be raised. In the instant case, those aboard the LEMBULUS actually saw the span being raised and, therefore, had an even firmer basis for believing that the span would be raised.

A similar decision was rendered by the Court of Appeals for the Seventh Circuit in *Munroe* v. *City of Chicago,* 194 Fed. 936 (7 Cir., 1912), cert. den., 229 U. S. 609. The steamer MARKHAM was bound up the Chicago river and signaled to a bridge. Her captain could see two red lights in the center of the bridge. The lights were placed on the bridge pursuant to regulations of the Lighthouse Board under the direction of the Department of Commerce and Labor. The lights showed red when the bridge was closed and green when open. At the time of the accident the bridge

was closed and the lights were red. In addition, there was no indication whatever that the bridge would be opened.

The District Court dismissed the libel. The Court of Appeals reversed, holding that a vessel, having given a proper signal and absent a specific warning, has the right to approach a bridge—even with a red light showing—with the expectation that the bridge would open in sufficient time to permit passage.

The Court of Appeals in the *Munroe* case made reference to an ordinance of the City of Chicago requiring a signal light to be shown when the bridge could not be opened and stated that, *inter alia*, the city was liable for not having provided and given a warning signal. It is interesting to note that in the instant case rule 2 of the New Jersey Highway Department regulations provides (Exh. P 13c, 1f):

> "If opening is delayed abnormally due to traffic conditions or to failure of equipment, the signal of two blasts is to be repeated at intervals until the draw can be moved."

In this case respondent did not sound two blast signals at intervals and, therefore, it would be fair for those aboard the LEMBULUS to assume that everything was operating normally. In any event no warning was given to the LEMBULUS.

The Court in both the *Majestic* case and the *Munroe* case cited the leading case of *Clement* v. *Metropolitan West Side El. Ry. Co.*, 123 Fed. 271 (7 Cir., 1903). In that case the steamer F. H. PRINCE signaled the bridge that it intended to pass and thereafter proceeded towards the bridge. It appeared that the locks would not work and that (p. 272):

> "* * * no signal or warning to the approaching boat was given with respect to the difficulty, otherwise than by the *red signal light* or lights upon the bridge." (emphasis added)

A collision ensued.

The Court of Appeals discussed the rights and obligations of the parties using the following much quoted language:

> "A bridge spanning a navigable river is an obstruction to navigation tolerated because of necessity and convenience to commerce upon land. Such a structure must be so maintained and operated that navigation may not be impeded more than is absolutely necessary, the right of navigation being paramount. It is incumbent upon the owner that the bridge be so constructed that it may be readily opened to admit the passage of craft, and maintained in suitable condition thereto. It is also his duty to place in charge those who are competent to operate the bridge, to watch for signals, and to open the bridge for the passage of vessels, and for the performance of such delegated duty he is responsible. It is also his duty to equip the bridge with proper lights giving warning of the position of the bridge and of its opening and closing. If for any reason the bridge cannot be opened, proper signals should be given to that effect, such as will warn the approaching vessel in time to heave to. A vessel, having given proper signal to open the bridge and prudently proceeding under slow speed, has, in the absence of proper warning, the right to assume that the bridge will be timely opened for passage. She is not bound to heave to until the bridge has been swung or raised and locked, and to critically examine the situation before proceeding (City of Chicago v. Mullen, 54 C. C. A. 94, 116 Fed. 292), but may carefully proceed at slow speed upon the assumption that the bridge will open in response to the signal, and may so proceed until such time as it appears by proper warning, or in reasonable view of the situation, that the bridge will not be opened (Manistee Lumber Company v. City of Chicago [D. C.] 44 Fed. 87; Central Railroad Company of New Jersey v. Pennsylvania Railroad Company, 8 C. C. A. 86, 59 Fed. 192), when it becomes the duty

> of the vessel, if possible to stop, and, if necessary, to go astern."

As heretofore noted, respondent always replied with two blasts to a steamer's signal of three. The Third Circuit ignored this behavior. However, the Seventh Circuit in *City of Chicago* v. *Chicago Transp. Co.*, 222 Fed. 238 (1915), posed this question (239):

> "May the city, by posting a universal 'No', excuse itself from having bridge tenders on duty who shall answer a vessel's requests for passageway by giving promptly the information that is appropriate to the immediate occasion? We think not * * *."

The City of Chicago had enacted an ordinance forbidding vessels to approach its drawbridges while a red ball by day or a red light by night was displayed, and further provided that the ball or lantern was to be lowered when ready and willing to permit a vessel to pass but "at all other times such signals shall remain elevated."

The ordinance of the City of Chicago is, in principle, the same as the behavior of respondent Peschken in the present case. Mr. Peschken by always sounding two blasts has posted a "universal No". The Seventh Circuit ruled that a "universal No" was improper. The Third Circuit ruled differently. We believe that the Engineers' rules should not be so easily evaded or that a bridge tender can convert his obligation into a burden on navigation simply by sounding the wrong signal. The *City of Chicago* case was decided in 1915 after enactment of 33 U. S. C. 494, and the Court looked to the *Clement* case to determine the rights and obligations of the respective parties. Those rights and obligations were not even discussed by the Third Circuit.

The decisions in the *Clement* and *City of Chicago* cases, supra, were cited and followed by the Sixth Circuit in *City of Cleveland* v. *McIver*, 109 F. 2d 69 (1940).

The decision of Third Circuit, therefore, is in conflict with decisions of the Fourth, Sixth and Seventh Circuits and, upon considering the overwhelming weight of these authorities, the Third Circuit erred.

The Circuit Court, in addition to reversing the District Court, has now overruled the prior opinions of two District Courts in the Third Circuit. The KARD, 38 F. 2d 844 (E. D. Pa., 1927) followed the *Clement* and *Monroe* cases, and *Conners Marine Co.* v. *N. Y. & Long Branch R. R. Co.*, 87 F. Supp. 132 (D. N. J., 1950) followed the *Clement* case.

The Court of Appeals has thus in 1961 introduced uncertainty into an area where the law was once considered settled since about the time of the *Clement* case in 1903 or the *Monroe* case in 1912. The Third Circuit's decision is the first of its kind and this Court does not appear to have passed upon the question.

2. There is a conflict between the decision of the Court of Appeals for the Third Circuit in this case and the decision of the Court of Appeals for the Second Circuit in *Merritt-Chapman & Scott Corp.* v. *Cornell Steamship Co.*, 265 F. 2(d) 537 (1959) and the decision of the Court of Appeals for the Fourth Circuit in the *Fort Fetterman* v. *South Carolina State Hwy. Dept.*, 261 F. 2(d) 563 (1958), rehearing, 268 F. 2(d) 27, relating to the applicability of the *Pennsylvania* rule to violations of the Corps of Engineers' regulations governing the erection and maintenance of bridges.

The District Court found (2b) that:

> "The continued use of the defective draw span elevating mechanism by the New Jersey State Highway Department was negligence on its part, and the knowledge of the persistence of that defect had been brought home to the bridge operator and the likelihood of a slow-up or stoppage in the opening of the draw was apparent to him. * * *"

The State of New Jersey has not waived its sovereign immunity and therefore cannot be made directly responsible

for its negligence in failing to repair the bridge or for its breach of the Engineers' regulations pursuant to which the bridge was permitted to be erected and maintained.

Instead, it is necessary to proceed in the first instance against the bridge tender *in personam* and then, if judgment is obtained, to apply for a private bill or other form of relief. While the State's immunity from suit permits it to be lax in observing rules and regulations governing public safety, the fact remains that the bridge tender was actually operating a defective bridge and, as pointed out by the District Court, the act of operating a defective bridge is wrongful. The opening sentence of 33 C. F. R. 203.200 (d) commands that the draws "shall be opened promptly" and a similar command appears in paragraph (e) where it is required that the draws shall be opened "at once". It is obvious that respondent, by operating a defective bridge could not open the bridge "promptly" or "at once".*

It was equally wrong and, we submit, a violation of the Engineers' regulation for the bridge tender to always and habitually reply to a steamer's three blast signal with two. The habitual use of a two blast signal destroys the effectiveness of the Engineers' regulations for that habitual signal becomes, in effect, no signal at all and it certainly is no warning such as that assumed by the Court of Appeals.

The doctrine of *The Pennsylvania* was applied by the Court of Appeals for the Second Circuit in *Merritt-Chapman & Scott Corp.* v. *Cornell Steamship Co.*, 265 F. 2d 537 (1959) to a breach of a Coast Guard regulation requiring a warning light on a bridge. In that case the light on the bridge was inadequate and, although the District Court had held that it did not contribute to the collision, held the bridge was at fault for breach of a statutory obligation.

The same doctrine was applied by the Court of Appeals for the Fourth Circuit when the South Carolina State High-

*Operation of a defect also violates the mandates in 33 U. S. C. Sections 494, 499 and 512 against obstructing free navigation.

way Department deviated from a bridge design approved by the Army Engineers. *The Fort Fetterman v. South Carolina State Highway Department*, 261 F. 2d 563 (1958).

The Court of Appeals should have applied the rule in the *Pennsylvania* case to the breaches of statutory obligations by the bridge operator, and its failure to do so constitutes error.

3. The decisions of our Courts in cases such as these have wide applicability throughout the United States, especially those having jurisdiction over commerce on the major rivers and in seaports, and the cities bordering them. The decisions also affect the application of rules of federal regulatory agencies designed to safeguard life and property.

Literally thousands of tugs, barges and seagoing vessels transit bridges while transporting goods and products to all parts of the country. At the same time, trains and other vehicular and pedestrian traffic cross said bridges discharging their functions. Together they provide the means for distributing our commerce and have a direct bearing on our welfare. It is therefore important that the law governing the flow of traffic and commerce be settled so as to avoid disrupting this commerce, and to guard against loss of life or property.

The Corps of Engineers is not the only regulatory agency concerned with decisions of the federal courts. For instance, the United States Coast Guard is concerned with the licensing and discipline of mariners for safety of life and property. *In the matter of license no. 175273, etc., issued to Philip E. Thorpe, Decision of the Commandant, United States Coast Guard, Appeal No. 1184*, the Commandant reviewed an order by a Coast Guard Hearing Officer who suspended the license of the master of a vessel navigating a river in Cleveland. The Commandant, in

reversing the order of suspension, relied heavily upon the decisions in the *Clement* and *Munroe* cases and held that the master was not negligent in approaching a bridge contrary to a local ordinance prohibiting such approach without permission from the bridge.

The case is also important from the point of view of public safety. For instance, records in the *Circle Line Sightseeing Yachts* case, supra, indicate that 258 persons were aboard, 87 were injured, 32 persons—including 5 on stretchers—were taken to hospitals and one died.

The collision between the LEMBULUS and the Hackensack River Bridge was unfortunately not the last. We have been informed that the m/v PLATIDIA collided with that very same bridge on July 7, 1961. We understand that, once again, the bridge tender failed to give proper signals and delayed its opening. We understand that the attitude of a "universal No" still exists and is quite likely to continue existing so long as bridge operators feel that they can place the entire onus of an accident upon a vessel merely by twisting the meaning of the Engineers' regulations.

The general attitude of bridge operators, in the interest of public safety, needs and demands correction.

The regulations of the City of New York (1e), for instance, do not comply with the Engineers' regulations. It directs that two blasts shall always be given upon receipt of a signal from a vessel. The regulation itself says that three blasts shall be given if the bridge is ready to rise. The City, on the other hand, says that the three blast signal shall not be given until the span is completely raised. In that situation, according to the Court of Appeals, the signalling vessel must stop. It cannot proceed, except at its own risk, until it receives what the Court called a three blast "come on" signal.

The City of New York's interpretation of the Engineers' regulation is contrary to the plain wording of said regula-

tion and is contrary to the substantive rights of the parties as enunciated in the *Clement* and *Munroe* decisions, and can lead only to confusion and perhaps a more serious disaster than that of the sightseer VIII collision. That attitude can lead only to repetitions of the same type as the LEMBULUS or the m/v PLATIDIA on July 7, 1961, and more. The number of vessels transiting bridges throughout the nation every day is tremendous, the risk of collision is also tremendous where bridge tenders give the wrong signal—a "universal No."

4. The Court of Appeals erred in another important respect, namely, it upset findings of fact by the District Court contrary to the decision of this Court in McAllister v. United States, 348 U. S. 19.

The District Court found, in effect, that the respondents' two blast signal was in reality no warning at all and when coupled with the immediate lifting of the span in its normal fashion was, as a matter of fact, an invitation to the LEMBULUS to proceed. The Court of Appeals for the Fourth Circuit in *The Majestic*, 80 F. 2d 879 at page 881 treated a similar situation as a question of fact and affirmed the District Court. The Third Circuit should have done the same in this case.

CONCLUSION

For the foregoing reasons, petitioner respectfully prays that its petition for a writ of certiorari be granted.

August , 1961.

Respectfully submitted,

ROBERT M. JULIAN
Counsel for Petitioner.

APPENDIX A

Opinion of the District Court

UNITED STATES DISTRICT COURT

DISTRICT OF NEW JERSEY
Civil Action, No. 793-59
IN ADMIRALTY

OPINION

THE SHELL PETROLEUM CO., LTD.,
as Owner of the M/S LEMBULUS,
Libelant,

vs.

CHARLES PESCHKEN, CANOLIUS V. HINES
and FRED W. BENTS,
Respondents.

Appearances:

McCARTER and ENGLISH, Esqs.,
By FRANCIS E. F. McCARTER, Esq.,
Proctors for libelant, and

ROBERT M. JULIAN, Esq. (New York Bar)
Of counsel for libelant.

DAVID D. FURMAN, Esq.,
Attorney General of New Jersey
By ALFRED P. D'AURIA, Esq.,
Deputy Attorney General
Proctor for respondents.

WORTENDYKE, District Judge:

This case properly invokes the Admiralty jurisdiction of this Court. The cause of action alleged in the libel

arises out of a collision between the British Motor Tanker Lembulus, owned by libelant, and the draw section of a New Jersey State Highway bridge over the Hackensack River, a navigable body of water of the United States, on December 20, 1957. The bridge is also locally known as the Lincoln Highway bridge, and extends between Jersey City and Kearney, New Jersey. The respondents were employees of the New Jersey State Highway Department, who were charged with and engaged in the performance of the duty of operating the highway drawbridge with the draw section of which the collision here involved occurred.

The Bridge Act of 1906, 33 U. S. C. § 499 provides that it shall be the duty of all persons operating and tending drawbridges built across the navigable rivers and other waters of the United States "to open, or cause to be opened, the draws of such bridges under such rules and regulations as in the opinion * * * of the Secretary of the Army the public interests require to govern * * * the opening of drawbridges * * * for the passage of vessels * * *, and such rules and regulations * * * shall have the force of law." Rules and regulations have been promulgated by the Secretary of the Army for the operation of the Lincoln Highway bridge and are to be found in 33 C. F. R. 203.200(d) and (e), which provide:

> "(d) When a vessel approaches within signaling distance of a bridge for passage, the master thereof shall signify his intention by three blasts of a whistle or horn. * * * The signal of the craft shall be immediately answered by the tender or operator of the bridge. If the draw is ready to be immediately opened, the answer shall be three blasts of a whistle or horn from the bridge. In case of delay in opening the draw, as is provided for in this sec-

> tion, or as may be necessary by accident to the machinery or other contingency the signal from the vessel shall be answered by two long blasts of a whistle or horn from the bridge * * *. In all cases when delay signals have been given, a signal of three blasts of a whistle or horn shall be given as soon as it is possible to open the draw.
>
> "(e) Upon hearing or perceiving the signals prescribed, the tenders or operators of a drawbridge, except * * * shall at once open the draw signaled for so as to allow the prompt passage of any vessel: * * *."

Other regulations promulgated by the New Jersey State Highway Department for the operation of the drawbridge provided that if the opening were delayed abnormally, due to traffic conditions or failure of equipment, "the signal of two blasts is to be repeated at intervals until the draw can be moved."

The evidence at the trial disclosed that the vessel had been moored at Kopper's Wharf on the westerly bank of the river at Kearney Point, New Jersey, some distance north of the Lincoln Highway bridge, discharging cargo. After cargo discharge, the vessel, in ballast, for a voyage to Curacao, Dutch West Indies, cast off from the wharf and proceeded downstream upon the river, followed by two tug-boats which had assisted in turning the vessel about after she cast off. She had been moored at the wharf port-side to, with the bow in an upstream direction. The Lembulus was 466 feet 2 inches in over-all length, had a beam of 54 feet 7 inches, and a loaded draft of 25 feet 7½ inches. Her gross tonnage was 6,503. In ballast, as she was upon her departure, her forward draft was 13 feet and her after draft 17 feet. She was clear of the wharf at 1529 hours on

the date stated, and headed downstream, or seaward, at 1542½ hours. The wind was fresh to strong from the southeast, and squally, with intermittent rain showers, and there was an incoming tide.

Before reaching the bridge with which the collision occurred, in her progress down the river, it was necessary for the vessel to negotiate, in the following order, the Lackawanna Railroad Bridge, and the so-called City bridge, a short distance to the south of the Lackawanna bridge, both of which are drawbridges, and then to pass beneath the fixed Pulaski Skyway bridge. Because of her position at the wharf during the cargo discharge operations, it became necessary for her to be turned around. There was some conflict in the testimony respecting the location at which the vessel, with the assistance of the two tugs, was turned about. The master of the vessel testified that this maneuver was executed to the south of the Lackawanna bridge, after the vessel had been towed stern-first through that draw, whereas evidence for the respondents was to the effect that the turn-around took place to the north of the railroad bridge and that the vessel passed through the draw of that bridge bow first. The vessel's Deck Log book discloses: "1537 V/L swinging in river. 1542½, V/L swung, slow ahead, proceeding downriver. 1543½, Lackawanna bridge opened. 1546 dead slow ahead, V/L cleared Lackawanna Bridge." These entries are confirmed by similar entries in the bridge movement book and in the engine movement book of the vessel. Whatever may have been the manner of her passage of the Lackawanna drawbridge, she accomplished it without incident, and her passage through the City bridge draw was also uneventful. Her navigation, while proceeding downstream, was under the control of Captain John Bassett, a Dock Master and

River Pilot, employed by the owner of the two tug-boats above mentioned, but his testimony could not be presented because of his death before the trial. However, the testimony of Captain Hawkins, the Master for the vessel, who was with the Pilot on the vessel's bridge during the operation, disclosed that, at 1546 hours, while passing through the draw of the City bridge, which crosses the river at a point 1.1 nautical miles to the north of the bridge with which the vessel collided, the Pilot signalled for the opening of the latter bridge by three blasts of the vessel's whistle. The giving of this signal is corroborated by the Chief Bridge Operator in his written report, following the collision. This signal was acknowledged by the Highway bridge by two blasts of its horn (the prescribed warning of delay in opening the draw), but the drawspan of the bridge nevertheless commenced to rise almost immediately.

The bridge operator, respondent Peschken, stated in his post-collision report to the New Jersey State Highway Department: "We knew that the tugs had gone up the river for the steamer and we were watching for them. When we seen (sic) them coming I signalled the gatemen to close the gates and I gave the steamer two long blast (sic) on the horn. Due to electrical trouble on the bridge this was done before the steamer reached the Skyway. The span was in upward motion before the steamer was under the Skyway." He testified on the trial, however, that he gave a second two-blast signal after the respondent Hines told him the vessel was "coming down pretty fast." Respondent Hines testified to a similar effect.

As the vessel was in the vicinity of the Pulaski Skyway bridge, its speed had been reduced to slow ahead. At 1555 hours the bridge draw-span appeared to the master to have

stopped rising and the vessel's engines were immediately brought to dead slow ahead and then to stop. At 1555½ hours they were driven full astern. By that time the position of the vessel with reference to the draw-span was such as to create doubt whether her masts would clear the draw-span of the bridge. The reversal of the engines was insufficient to eliminate all way from the vessel, and the fore topmast hit the bridge draw-span section, which was struck again within a few moments thereafter by the main topmast. After the latter contact the bridge draw-span section rose or continued to rise to its fully elevated position. Upon inspection, the points of contact of the span girder were found to be nine feet ten inches below the truck on the fore topmast and six inches below the truck on the main topmast. Following these conditions, the vessel proceeded to the marine repair yard of Bethlehem Steel Company at Stapleton, Staten Island, New York, where the damage was repaired. The voyage to Curacao was then resumed on December 23, 1957.

Captain Hawkins testified that after the Highway bridge signaled to acknowledge the vessel's signal, no further warning of the stopping or slowing of the rise of the draw-span, or of any difficulty in its operation, was given, and that the orders to stop and reverse the engines were given upon the Pilot's visual observation from the vessel's bridge of the slowing or stopping of the lifting of the draw-span.

Respondents concede that the vessel passed through the Lackawanna bridge draw at 1546. This fact is disclosed by the log book of the tender of that bridge, as well as by the deck log book of the vessel. The bridge tender of the City bridge testified that the vessel passed through his draw

at 1548 hours. She was then somewhat over one-half a nautical mile north of the Pulaski Skyway fixed bridge beneath which she was about to pass, and at that time the Lincoln Highway bridge's draw-section was already in upward motion. Libelant contends that the vessel's fore topmast struck respondents' draw-section at 1557 hours, ship's time. Respondents' draw-bridge log reports the vessel's passage through the Lincoln Highway draw between 3:42 and 3:48 p. m. (1542/1548 hours). This entry is obviously incorrect, especially in view of the entry in the railroad bridge tender's log book that the vessel passed through the Lackawanna draw at 1546. If the vessel passed through that draw at 1546 and through the City bridge draw at 1548 hours, she could not have reached the Lincoln Highway bridge, 1.1 nautical miles away, at the same instant. I find as a fact that the vessel covered the distance to the Lincoln bridge in nine minutes, or at the rate of 743.132 feet a minute, an average of 7.33 knots. The Captain of the Lembulus, however, admitted that her average speed between the Skyway and the Lincoln Highway bridges was 9 knots. Average speed between the designated points is misleading, however. A high speed at the start and slow speed near the finish averages the same as would the reverse of those speed allocations. I am concerned with the speed of the vessel between the moment the bridge span commenced to rise and that of the collision. Her course was generally southwest; the wind was fresh to strong from the southeast, and she was moving against an incoming tide. She had slowed from full ahead to slow ahead at 1553 hours, five minutes after passing through the City bridge draw and four minutes prior to the collision, and her engines were stopped at 1555 hours and at 1555½ hours

were ordered to full astern. They were going full astern at the moment of collision. A master mariner, familiar with vessels of the size of the Lembulus, and with the Hackensack River channel in which she was proceeding, testified, for respondents, that under the circumstances and conditions existing at the time of the occurrence here in question the maximum safe speed for the vessel between Koppers Wharf and the Lincoln Highway bridge would be 3½ to 4 knots. But this opinion of the witness was predicated upon the assumption, contrary to fact, that the tide was ebbing. The opinion of this expert that a speed of nine or ten knots between Kopper's Wharf and the Lincoln Highway bridge would be excessive does not impel me to conclude that the vessel was moving at an excessive speed over the ground between the point at the Skyway bridge where she signaled for the opening of the draw at 1553 hours, with her engines at slow ahead, and that of her contact with the draw section at 1557 hours. Between these two points her engines reached no higher speed than dead slow ahead, and they were going full astern at the moment of collision. I am not convinced that the speed at which she was traveling was immoderate or excessive because of the existing weather and tidal conditions.

As already pointed out, the regulations governing the operation of the Lincoln Highway drawbridge as the Lembulus approached it required the vessel to indicate her intention to pass through the draw by three blasts of her whistle when within signaling distance of the bridge. It is uncontradicted that the Lembulus complied with this requirement. The bridge operator was required, by the same regulations, to answer the vessel's signal with three blasts of the bridge's horn if the draw was ready to be immedi-

ately opened, but if there were delay incident to mechanical failure or otherwise, he was required to so indicate by two long blasts of the bridge horn. *33 C. F. R. § 203.200.* Captain Hawkins testified that as the Lembulus was "about to pass under the Skyway bridge at approximately 1553 hours, three whistle blasts were blown" by the vessel as a signal to the bridge to open. He further testified that "the bridge answered our signal and commenced lifting almost immediately." It will be observed that the Captain did not say of how many blasts the bridge's answering signal consisted. The vessel's speed was then reduced to dead slow ahead to enable her to shape course to pass through the comparatively narrow opening afforded by the draw. That the draw span was rising in what appeared to the vessel to be a normal manner following its receipt of her signal, but that the span then seemed to slow to such an extent that it was difficult to tell whether it was still moving or had stopped, was confirmed by the testimony of the Captain of one of the tug boats, which accompanied the Lembulus as she approached the bridge. He also testified that the Lembulus was moving very slowly as she approached the draw. He, however, was not asked how many blasts were given by the bridge tender in answer to the vessel's signal, nor whether any subsequent warning was sounded from the bridge.

Peschken had been aware for some time previous to the date of the collision that the electrical operating mechanism of the drawbridge was in a defective condition. Respondents' witness, Iannaccone, in charge of maintenance of the electrical bridge draw operating facilities for the State Highway Department, had discovered some time previously a malfunction in the mechanism of the Lincoln Highway bridge, which manifested itself only when the speed

of the bridge opening was above what he called the "third power point". It was known to the electrical supervisor as well as to the drawbridge operator that the draw could only be opened slowly because of the risk of stoppage through power failure. Despite the two-blast response of the bridge to the vessel's three-blast signal to open, the prompt commencement of the draw opening was inconsistent with the implications of the two-blast bridge response, and constituted no notice that the draw would open slowly or stop during its rise. The vessel was entitled to assume that it might proceed with safety from the point at which it was at the time the span commenced to rise.

There is another aspect of the case which discloses failure of the drawbridge operator to exercise the degree of care imposed upon him not only by the governing regulations, but also because of the peculiar circumstances of the situation, including his knowledge of the risk of stoppage of the draw through power failure. The electrical supervisor testified that the draw opening mechanism was provided with dual control systems so that, in the event of failure of one, an alternate might be used in the lifting of the draw-span. The slowing or stopping of the draw, which occurred in this case, and which unquestionably resulted in the damage to the topmasts of the vessel, satisfies me that the power failure actually occurred, and that the alternate control available to overcome such failure was not employed.

A bridge spanning a navigable river which constitutes an obstruction to navigation must be so maintained and operated that navigation may not be impeded more than is absolutely necessary. The right to navigate the river is paramount to the right to maintain a bridge across it, and therefore a bridge must be so constructed and maintained

that it may be readily opened to admit the passage of vessels. "If for any reason the bridge cannot be opened, proper signal is to be given to that effect, such as will warn the approaching vessel in time to heave to. A vessel, having given proper signal to open the bridge and prudently proceeding under slow speed, has, in the absence of proper warning (from the bridge) the right to assume that the bridge will be timely opened for passage. She is not bound to heave to until the bridge has been swung or raised and locked and to critically examine the situation before proceeding, but may carefully proceed at slow speed upon the assumption that the bridge will open in response to the (vessel's) signal, and may so proceed until such time as it appears by proper warning, or in the reasonable view of the situation, that the bridge will not be opened when it becomes the duty of the vessel, if possible, to stop, and if necessary, to go astern." *Clement* v. *Metropolitan Westside Elevated Railway Co.*, 7 Cir. 1903, 123 Fed. 271, 273; *Munroe* v. *City of Chicago*, 7 Cir. 1912, 194 Fed. 936, 940. The duty of the bridge operator to signal if the draw cannot be opened at all is the same as that required if the draw cannot be opened sufficiently to permit the vessel's passage without contact therewith. The same rule was applied under similar circumstances in *The Kard*, 3 Cir. 1930, 38 F. 2d 844, and still more recently by Judge Meaney of this Court, in *Conners Marine Co.* v. *New York and Long Branch Railroad Co.*, 1950, 87 F. Supp. 132. Respondents seek to distinguish *The Kard, supra, Clement* v. *Metropolitan Westside Elevated Railway Co., supra*, and *Munroe* v. *Chicago, supra.* In *The Kard* the bridge tender gave the signal in response to that of the tug boat, raised the draw span to less than the required height and the tow collided with the bridge. In that case, however, as in

the *Clement* case, the failure of the bridge tender to give the vessel warning, coupled with the partial raising of the draw span, was held to have constituted an invitation to the tug to come on through. In the *Munroe* case, 7 Cir. 1912, 184 Fed. 936, cert. den. 229 U. S. 609, the vessel which was ascending the Chicago River at night, signalled for the opening of the draw bridge owned by the City. The bridge was neither opened nor was any warning given that the bridge owner (City) had failed to keep someone in charge to operate the draw upon proper signal from a vessel. The decree for the City was reversed.

A similar situation existed in *The Louise Rugge,* 3 Cir. 1917, 239 Fed. 458, although in that case the bridge was a temporary structure and the vessel had laid-to until the light on the end of the span showed that it had been raised and stopped. There was no warning given by the bridge tender that the vessel should not attempt to navigate the passage.

Portions of the deposition of the respondent Peschken, taken pursuant to Rule 26, were read into the trial record, and disclose that he then testified that when his men notified him that the steamer was coming, it was some distance up-river and had not yet reached the Skyway where she gave her three-blast signal. Peschken was aware of the electrical trouble with the drawbridge mechanism, and therefore commenced to open the draw as soon as he was aware of the vessel's approach. He also testified that the span was in upward motion before the steamer was under the Sky-way bridge, but that he was opening the draw slowly as a precaution against a recurrence of the previous electro-mechanical failure. Peschken also testified upon these depositions that although he was aware that the regulations required, in case of delay in opening the draw span

due to failure of equipment, that the two-blast warning signal be repeated at intervals until the draw could be moved, he did not, at any time, comply with that requirement or with the requirement that three blasts of the siren be given when the span starts to rise. In refraining from giving the required three-blast signal when the draw commenced to open, and in giving instead a two-blast signal Peschken said he was following his usual practice. Despite this testimony on deposition, Peschken testified at the trial that he had repeated the two-blast signal to the vessel before the collision. If such testimony is true, it would indicate that the bridge tender twice warned the vessel to stand-off, although at the same time continuing to open the draw-span.

Respondents argue that because the evidence disclosed that there were frequent heavy rain showers on the day of the collision, the vessel was required to sound a prolonged blast of her whistle at intervals of not more than one minute in compliance with 33 U. S. C. § 191, which provides for such a signal "in fog, mist, falling snow or heavy rain storms." Because of the admitted non-compliance with this requirement on the part of the vessel, respondents seek to apply "The Pennsylvania" rule (*The Pennsylvania*, 86 U. S. 125), which requires that a vessel bear its own loss unless she can show that her fault could not have contributed to the accident. I conclude that the cited statutory section is not applicable in the circumstances disclosed by the evidence in this case. In *The Pennsylvania*, the collision between the two vessels occurred in a very dense fog. There is no evidence in the case before me indicating that it was even raining at the time of the occurrence, or that any rain which had been or may then have been falling had any effect upon visibility. The bridge personnel both heard and saw the vessel approaching. It was the

visual observation by the Pilot of the vessel that the draw-span of the bridge was rising following the vessel's whistle signal that induced him to continue to approach the bridge with the intention of passing through the draw. Respondents' further reliance upon Section 192 of Title 33 of the United States Code is equally misplaced for support of respondents' contention that the provisions of that section were being violated because the vessel was not proceeding at a moderate speed.

Respondents rely upon *Linde-Griffith Construction Co.* v. *The Authentic*, 2 Cir. 1954, 210 F. 2d 757, for support of their contention that in continuing to approach the draw despite her receipt of the two-blast warning signal or signals, the Lembulus acted in direct violation of the provisions of 33 C. F. R. 203.200. In *The Authentic* case the bridge operator was exonerated because of the "glaring" fault of the tug which was towing the pile driver. In that case the tug blew the usual three-blast signal, which was answered by a two-blast signal from the bridge, forbidding the closer approach of tug and tow, because the span was being used by passing rail traffic. After traffic on the bridge had cleared, the draw span was raised to its normal elevation. The bridge tender then gave the tug the correct signal to proceed through the draw, but because of the improper handling of the tug, in shaping herself and her tow for passage of the draw, the pile driver collided with the opened leaf of the draw-span. It was not until the pile driver was actually passing through the draw that the inevitability of its contact with the bridge girder became manifest. It was then too late for the bridge tender to raise the draw-span through its additional three degree range. In the case before me the issue of liability appears to be dependent upon the respective opportunities of the vessel and the bridge to

avoid the collision which occurred. If, as the respondents contend, the bridge tender gave the signal warning to stand off because of the possibility of power failure, and if the vessel had heeded that warning, then when the bridge tender had succeeded in fully opening the draw he might be expected to give the prescribed "come-on" signal of three blasts, which would have permitted the vessel to pass through unharmed. On the other hand, the bridge commenced to open immediately following the vessel's signal, and continued to open, despite the two-blast signal or signals which the respondents claim were given. When the vessel was but a ship's length from the draw the span was observed to slow or stop, and although her engines were then driven full astern, it was too late for the vessel to avoid the contact with the bridge girder. See *Clement* v. *Metropolitan Westside Elevated Railway Co.*, 7 Cir. 1903, 123 Fed. 271, 273; *The Kard*, 3 Cir. 1930, 38 F. 2d 844. In *Connors Marine Co.* v. *New York and Long Branch R. Co.*, D. C. N. J. 1949, 87 F. Supp. 132, no answer was given by the bridge tender to either of two signals from the vessel, whereupon her engines were slowed and then stopped, but due to wind and tide, she drifted out of shape for passage through the draw. The draw span was ultimately opened, but in attempting to pass through the draw, the barge which was being towed by the vessel collided with the bridge abutment and was damaged. The Court there concluded that both bridge and tug were at fault, entitling the tug owner to contribution from the bridge owner. The failure of the bridge tender to give an answering signal invoked the Court's application of *The Pennsylvania* rule, *supra*, (86 U. S. 125).

In our case, the bridge draw was actually being operated by the respondent Peschken. While he did not personally

see the approach of the Lembulus as she proceeded downstream, it was reported to him by the respondent Hines, who, together with the respondent Bents, heard the vessel's three-blast signal of her intention to pass through the draw. This signal was also heard by Peschken when the vessel was over a nautical mile distant from the bridge. Peschken apparently started to open the draw promptly after receiving notification of the vessel's approach. However, when the draw section stopped in its ascent, or slowed to a point at which it appeared to have stopped, the bow of the vessel was then approximately her length away from the bridge abutment, and shaped for passing through the draw, at which time it first became apparent to her Captain that the topmasts would not clear. Whether, therefore, the bridge draw-span had actually stopped, or whether it had but slowed to an almost imperceptible speed, it was then too late for the vessel to avoid the collision, despite stopping her engines and then reversing their revolutions.

Respondents argue that the vessel contributed in the causation of her own damage by reason of the speed at which she approached the draw, in view of the conditions of weather, wind and tide prevailing at the time, and of the lightness of her lading. I have herein discussed at length the progress of the vessel from the Kopper's Wharf to the point of the collision. This consumed some ten minutes of time. The bridge tender testified to his awareness that the vessel was expected to come downstream by reason of the passage upstream earlier of the tugs to assist her. The bridge crew testified that they saw and heard the vessel approaching before she passed the Skyway bridge. If they were unable to accomplish the opening of the draw within that period of time, they were under the obligation of giving warning to the vessel in accordance with the

governing regulations. Mr. Iannaccone testified that operation on the "third power point" required four minutes to fully open the draw, and that ten minutes would be ample time for lifting the span to its maximum height using either the normal or the emergency controls for the purpose. It is uncontradicted that the vessel passed under the City bridge at 1546 hours and that her foretopmasts struck the Lincoln Highway drawbridge span at 1557 hours. It is also uncontradicted that the distance between these two bridges is 1.1 nautical miles. Based on the vessel's bridge log, the master testified that after passing under the City bridge at 1546 hours the vessel's speed was dead slow ahead, and that at 1547½ hours she was given full ahead, harbor speed, or 9 knots. The witness further testified that it would take about ten minutes to build up to the nine knots speed from a half ahead under the conditions existing at the time. At 1553½ hours, six minutes after her engines had been placed on harbor full ahead, their speed was reduced to slow ahead and dead slow ahead by immediately succeeding signals. The evidence is barren of any justification for assumption that the vessel had any reason to assume that the speed at which she was approaching the draw could involve any risk of the developments which occurred. I find that by commencing the raising of the draw-span immediately following his "warning" signal, the physical raising of the bridge countered the effect of such warning, and served as an invitation to the vessel to proceed. See *Clement* and *The Kard, supra.* I can, therefore, find no basis for concluding that the vessel contributed in bringing about the collision, and am unable to relieve the draw bridge operator of responsibility for the occurrence.

There remains the question of the liability of the respondents Hines and Bents to the libelant. While it is true

that these two respondents were, with Peschken, employees, and therefore agents or servants of the bridge owner, I can find in the evidence no basis for concluding that any act or omission on the part of, or chargeable to Hines or Bents contributed in the causation of the collision. Each of the three respondents had certain functions to perform in the opening of the span, and the responsibility for the giving of signals to approaching vessels and for operating the lift mechanism of the draw span appears to have rested exclusively upon Peschken. Therefore, there is but one claim in this case, namely, that of the vessel against Peschken. No liability has been proven against Hines or Bents.

The negligence which I find solely responsible for the collision was that of Charles Peschken alone. A decree may be entered in favor of the libelant and against the respondent Charles Peschken only, for such damages as libelant may prove, in accordance with the applicable Admiralty practice of this Court, and for its costs herein. Judgment may be entered for the respondents Canolius V. Hines and Fred W. Bents against the libelant for their costs.

This opinion shall constitute my findings of fact and conclusions of law. Let judgments be entered accordingly.

REYNIER J. WORTENDYKE, JR.
Judge, United States District Court.

APPENDIX B

Opinion of the District Court Denying Motion for Judgment in Favor of Respondent Charles Peschken Notwithstanding the Court's Opinion Filed on June 24, 1960

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY
NEWARK 1, N. J.

October 26, 1960

REYNIER J. WORTENDYKE, JR.
Judge

Re: C-793-59—The Shell Petrolum Co. Ltd., etc.
vs. Charles Peschken, et als

McCarter and English, Esqs.,
11 Commerce Street,
Newark 2, New Jersey

Attn.: Francis E. F. McCarter, Esq.
With extra copy for
Robert M. Julian, Esq.

David D. Furman, Esq.,
Attorney General of New Jersey,
State House,
Trenton, New Jersey

Attn.: Alfred P. D'Auria, Esq.
Deputy Attorney General

Gentlemen:

My findings of fact and conclusions of law in this case were embodied in my opinion filed June 24, 1960 which has been reported in 184 F. Supp. 950. Thereafter libellant noticed a motion to settle the form of the interlocutory decree, but before the return of that notice, respondent Charles Peschken noticed a motion for judgment in his

favor notwithstanding my findings and conclusions. The latter motion was orally argued and the arguments supplemented in writing.

I have reviewed my filed opinion in this case, my trial notes, the transcript of the testimony and the pretrial depositions, and have considered the authorities and arguments cited and advanced by counsel. I am not convinced that my previous findings and conclusions should be modified.

Respondent's motion is grounded upon his contentions that (1) the evidence failed to justify a finding of negligence on the part of the bridge-tender, and (2) fault on the part of the vessel, causally related to the collision, is clearly disclosed by the proofs. I cannot agree with either of these contentions.

The continued use of the defective draw span elevating mechanism by the New Jersey State Highway Department was negligent on its part, and the knowledge of the persistence of that defect had been brought home to the bridge operator and the likelihood of a slow-up or stoppage in the opening of the draw was apparent to him. There is no evidence that the master of the vessel or her pilot had knowledge either of the defect or of the regulations adopted by the Highway Department with regard to the giving of warning signals, and therefore the vessel was entitled to rely upon the regulations promulgated by the Secretary of the Army, from which I have quoted in my filed opinion. Assuming as true the bridge operator's testimony that he gave a two-blast signal in response to the three blasts from the vessel, the commencement of the opening of the draw almost immediately thereafter and its obvious continuance,

without further warning signal until the vessel was so close as to be unable to stop her forward movement, constitutes, in my opinion, negligence on the part of the bridge operator which was solely responsible for the collision complained of. In sum, the commencement of the opening of the draw so promptly after the two-blast signal under the weather conditions which existed at the time, coupled with the continued rise of the draw span without further warning signals until collision was inevitable, constituted a reliable invitation on the part of the bridge operator to those in charge of the vessel's nagivation to proceed and to expect that when the vessel entered the draw the span would have reached an elevation permitting her masts to pass beneath it without contact. I do not find that the vessel's speed played any part in bringing about the collision.

Accordingly, the motion of Charles Peschken for judgment notwithstanding the Court's filed opinion in this case must be denied.

Very truly yours,

REYNIER J. WORTENDYKE, JR.
Reynier J. Wortendyke, Jr.
Judge, United States District Court

RJW.Jr/e
Original to Clerk for official file.

APPENDIX C

Opinion of the Court of Appeals for the Third Circuit

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 13,481

THE SHELL PETROLEUM COMPANY, LIMITED, a corporation in its own behalf as Owner of the Motorship Lembulus

v.

CHARLES PESCHKEN,

Appellant

and

CANOLIUS V. HINES and
FRED W. BENTS

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW JERSEY.

Argued May 2, 1961
Before GOODRICH and STALEY, *Circuit Judges;* and FORMAN, *Senior Circuit Judge.*

OPINION OF THE COURT

(Filed May 23, 1961)

By GOODRICH, *Circuit Judge.*

This is an appeal from an interlocutory decree for the libellant in an admiralty case. The ship Lembulus, owned by The Shell Petroleum Co., Ltd., collided with a draw-

bridge known as the Lincoln Highway Bridge on December 20, 1957. At the time of the collision the bridge was in the process of opening. The respondent Peschken was the chief drawbridge operator of the bridge. Two other persons who were part of the bridge crew were sued in the court below but the action against them was decided in their favor and there has been no appeal. The district court opinion may be found in 184 F. Supp. 950 (D. N. J. 1960). This opinion was somewhat modified later by a letter which is not reported. The question to be decided in this case is a much simpler one than the oral argument by the parties and their briefs would indicate.

The Lembulus discharged its cargo at Kearney Point, New Jersey, some distance north of the Lincoln Highway Bridge, the locus of the collision. She was taken out into the channel of the Hackensack River with the help of tugs and started downstream. As the vessel was in the vicinity of the Pulaski Skyway approaching the Lincoln Highway Bridge, she gave three blasts of her whistle to indicate to the bridge operators that she desired to pass through. This signal was answered by two blasts from the bridge It may be that this two-blast signal was repeated by the bridge but the court made no finding to this effect and whether a second two-blast signal was given is not material to our determination of this case. At the time the bridge answered the ship with the two-blast signal those in charge immediately began the process of opening the draw. No one from the bridge gave a three-blast signal which would have indicated to the ship that she could come ahead. The ship proceeded in the direction of the bridge. The bridge mechanism either stopped momentarily or slowed down so that the draw was not fully open at the

time when the Lembulus reached the bridge. She hit the partially opened draw with both her fore topmast and main topmast. This is the damage complained of.

The legal problem presented by the above facts seems to us one which can be settled quickly. The Secretary of the Army, by statute, (33 U. S. C. A. § 499) has authority to make rules and regulations to govern the opening of drawbridges for the passage of vessels on navigable waters. Such regulations have the force of law. *Cf. Belden* v. *Chase,* 150 U. S. 674 (1893). The portion of the regulation applicable to the case before us is found in 33 C. F. R. 203.200 (1949). Here is the relevant language:

> "(d) When a vessel appoaches within signaling distance of a bridge for passage, the master thereof shall signify his intention by three blasts of a whistle or horn . . . . The signal of the craft shall be immediately answered by the tender or operator of the bridge. If the draw is ready to be immediately opened, the answer shall be three blasts of a whistle or horn from the bridge. In case of delay in opening the draw, as is provided for in this section, or as may be necessary by accident to the machinery or other contingency, the signal from the vessel shall be answered by two long blasts of a whistle or horn from the bridge. In all cases when delay signals have been given, a signal of three blasts of a whistle or horn shall be given as soon as it is possible to open the draw."

The Lembulus disobeyed the rule as is readily apparent from the statement of facts given above and reading the command set out in the rule. She signaled properly in approaching the bridge. But the bridge responded with the caution signal and under the rules that is the effective

signal until removed by a three-blast signal from the bridge. It appears from the evidence that there had been some difficulty with the mechanism of the draw raising apparatus. The two-blast signal was quite proper under those circumstances and had it been obeyed the collision would not have occurred. The error on the part of the learned trial judge was in his statement that the immediate response to the Lembulus's signal was the beginning of the operation to raise the bridge. The judge thought that this was an invitation to continue forward on the part of the bridge operator and, we suppose, withdrawal of the warning given by the two-blast signal. The court relies on several cases where it has been said that in the absence of warning to the contrary a ship approaching a bridge may assume the bridge will be open when it arrives.[1] Those cases are completely reconcilable with our conclusion here. Peschken, operating the Lincoln Highway Bridge, did give the warning signal. Perhaps he gave it twice. And no three-blast "come ahead" was given. The ship is clearly at fault. If her failure to obey the signal contributed to the collision, she cannot recover under the rule of *The Pennsylvania,* 86 U. S. 125 (1873). But we do not need the authority of *The Pennsylvania* to decide this case against the libellant. The disobedience of the rule was the substantial cause of the collision.

Language from *Belden* v. *Chase,* cited above, is apposite to the situation here. Speaking of the rules the Court said, "They are not merely prudential regulations,

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[1]The Louise Rugge, 239 Fed. 458 (3d Cir. 1917); Munroe v. Chicago, 194 Fed. 936 (7th Cir. 1912), *cert. denied,* 229 U. S. 609 (1913); Clement v. Metropolitan West Side El. Ry. Co., 123 Fed. 271 (7th Cir. 1903); Conners Marine Co. v. N. Y. & Long Branch R. R. Co., 87 F. Supp. 132 (D. N. J. 1950); The Kard, 38 F. 2d 844 (E. D. Pa. 1930).

but binding enactments, obligatory from the time necessity for precaution begins, and continuing so long as the means and opportunity to avoid the danger remain . . . . Obviously they must be rigorously enforced in order to attain the object for which they were framed . . ." *Id.* at 698.

Our view of the case makes it unnecessary to decide at what point the vessel turned so as to proceed bow foremost downstream. It is also unnecessary for us to consider the disputed question of the speed of the Lembulus as she approached the bridge. Whether she was going fast or slow does not matter because she disobeyed the rule, whatever was her speed.

The judgment of the district court will be reversed and the case remanded with directions to enter judgment in favor of the respondent.

A true Copy:

Teste:

Clerk of the United States Court of Appeals for the Third Circuit.

APPENDIX D

Judgment of the Court of Appeals for the Third Circuit

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

THE SHELL PETROLEUM COMPANY, LIMITED, a corporation in its own behalf as Owner of the Motorship LEMBULUS
vs.
CHARLES PESCHKEN, *Appellant,*
and
CANOLIUS V. HINES and FRED W. BENTS

No. 13,481

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW JERSEY

Present: GOODRICH and STALEY, Circuit Judges; and FORMAN, Senior Circuit Judge.

JUDGMENT

This cause came on to be heard on the record from the United States District Court for the District of New Jersey and was argued by counsel.

On consideration whereof, it is now here ordered and adjudged by this Court that the judgment of the said District Court in this case be, and the same is hereby reversed, with costs, and the case remanded with directions to enter judgment in favor of the respondent.

Attest:
IDA O. CRESKOFF
Clerk

May 23, 1961

APPENDIX E

Departmental Rules on Openings

(All Bridges)

THESE RULES ARE IN CONFORMITY WITH THE REGULATIONS PRESCRIBED BY THE DEPARTMENT OF THE ARMY, FOR THE OPERATION OF DRAW BRIDGES IN THIS SECTION.

Signals

All call signals for openings shall be answered promptiy by the bridge by 2 long distinct blasts.

This signal indicates to the boat that the call signal has been heard and preparations to open will be made.

After this signal the Bridge Operator shall open his bridge at such a time which in his judgment and experience will permit prompt passage of the boat without unreasonable delay and will not create any unreasonable delay to land traffic.

At no time shall the draw be moved until all sidewalk and roadway traffic gates are locked in their closed position.

If the draw cannot be opened the 2 blast signal shall be repeated until acknowledged by the boat.

It is extremely important that the draw be brought to its fully opened position at all times, irrespective of the size of the boat. (This does not apply to test openings).

When the draw is fully opened the Bridge Operator shall sound the same signal as the call signal.

While the draw is in its fully open position no attempt shall be made toward closing until the passing boat has cleared the draw.

Departmental Rules on Openings
(All Bridges)

Except in rare emergencies the draw shall not be moved either in closing or opening while there is a boat in the draw. When the draw is fully closed and land traffic can be resumed the Bridge Operator is to sound *one* blast which will be the signal for the Bridge Tenders to open all traffic gates. Visual signals shall be used as prescribed by the Department of the Army whenever sound signals cannot be given or if sound signals cannot be heard.

The time of an opening shall be the interval between the time the traffic gates are closed and the time they are opened. In addition to the United States Government hours of opening, all movable bridges over the Harlem River will be open on call signal by any boat between the hours of 7 P.M. and 6 A.M. of the next day.

Thus the *closing hours* of these bridges over the Harlem River (except for U. S. Government or Municipal Boats) will be from *6 A.M. to 10 A.M.* and again from *5 P.M. to 7 P.M.*

APPENDIX F

Exhibit P-13c introduced into evidence, record page 177. Photograph of New Jersey State Highway Department Rules posted on Hackensack River Bridge.

NEW JERSEY STATE HIGHWAY DEPARTMENT

RULES

GOVERNING PROCEDURE IN OPENING AND CLOSING DRAWBRIDGES

1. Gates are to be closed and draw opened when, in the operator's judgment, the boat has approached within a proper distance.

2. If opening is delayed abnormally due to traffic conditions or to failure of equipment, the signal of two blasts is to be repeated at intervals until the draw can be moved.

3. On vertical lift bridges, three blasts of the siren are to be given (four blasts for government craft) when the span starts to raise, and the operator shall continue to raise the span until the boat enters the draw, or the nearly-open limit is reached. If it appears that the nearly-open limit will be required, then the by-pass shall be used and the span raised to the fully-open limit. Span shall not be moved in a downward direction until the entire craft or assembly or crafts has passed through the draw. One gateman, designated by the operator, shall be responsible for certifying when the channel is cleared; and for advising the operator of the approach of other boats which may require the draw to remain open. In the latter case, the operator shall decide whether to wait or close. Two blasts of the siren are to be blown when the span has started to close.

4. No other signals than those indicated in the foregoing rules are to be used in connection with the opening and closing of drawbridges.

5. Duration of opening shall be the time elapsed from the closing to the opening of traffic gates, to the nearest minute.

ALL MEN OPERATING DRAWBRIDGES ARE REQUIRED TO COMMIT THESE RULES TO MEMORY. ALL PRACTICES CONTRARY TO THESE RULES SHALL BE DISCONTINUED IMMEDIATELY.

VIOLATION OF ANY OF THEM SHALL BE CAUSE FOR DISCIPLINARY ACTION.

APPENDIX G

Statutes and Regulations Involved

33 C. F. R. 200; 33 U. S. C. 494; 33 U. S. C. 499; 33 U. S. C. 512

33 C R. F. 200

§ 203.200 *Newark Bay, Passaic and Hackensack Rivers, and their navigable tributaries; General Regulations.* (a) The draws shall be opened promptly, upon signal, for the passage of vessels during the day or night, except as prescribed in paragraphs (b), (c), or (f) of this section.

(b) During the hours between 7:30 and 10:00 a.m. and between 5:00 and 7:30 p.m. drawbridges shall not be required to remain open longer than 10 minutes nor shall the passage of any vessel be delayed for longer than 10 minutes except as provided in paragraph (f) of this section.

(c) The draw of any bridge used solely for the United States mail, passenger, and express trains need not be opened for a vessel reaching said draw less than 5 minutes before the scheduled arrival of any such train until such train passes, unless the bridge tender has notice that the train is delayed more than 5 minutes. The owners of bridges acting under this rule shall maintain a tug at the drawbridge to control and aid in the passage of vessels.

(d) When a vessel approaches within signaling distance of a bridge for passage, the master thereof shall signify his intention by three blasts of a whistle or horn. For those bascule bridges that have two separate and distinct drawspans the approaching vessel shall signal for an opening of the bridge in the customary manner by three blasts of a whistle or horn, and this shall be followed after a short interval with one blast, if it is desired that the drawspan on the starboard hand as the vessel approaches be opened, or by two blasts if it is desired that the one on the port hand be opened. The signal of the craft shall be immediately an-

swered by the tender or operator of the bridge. If the draw is ready to be immediately opened, the answer shall be three blasts of a whistle or horn from the bridge. In case of delay in opening the draw, as is provided for in this section, or as may be necessary by accident to the machinery or other contingency, the signal from the vessel shall be answered by two long blasts of a whistle or horn from the bridge. In all cases when delay signals have been given, a signal of three blasts of a whistle or horn shall be given as soon as it is possible to open the draw.

(e) Upon hearing or perceiving the signals prescribed, the tenders or operators of a drawbridge, except as provided in paragraphs (b), (c) and (f) of this section, shall at once open the draw signaled for so as to allow the prompt passage of any vessel or craft: *Provided,* That the bridge may not be opened when there is a train, wagon, or vehicle at the time passing over said drawspan, or a train approaching so closely that it cannot be safely stopped before reaching the bridge, but it shall be opened as soon as the drawspan can be cleared. In case the opening of the draw will be delayed under the provisions of paragraph (c) of this section the tug stationed at the draw shall immediately go to the assistance of the vessel.

(f) Each tug, towboat, barge and other small craft regularly and habitually navigating the aforementioned waterways shall be subject to inspection and measurement by the district engineer, Engineer Department at Large in charge of the locality, to determine which vessels, if any, would, by reasonable reductions in heights of masts and/or stacks, be capable of passing under the closed draw of any bridge affording at least vertical clearance of 35 feet at mean high water. The said district engineer will notify the owners

of such vessels as can be so modified, of the date by which the modifications shall be completed. In the event of the failure of said owners to comply with such notification, the district engineer will authorize the above bridge owners to delay opening their bridges, for the passage of said vessels, until convenient to do so, but on no occasion for more than 45 minutes: *Provided, however,* That such vessel shall not be so delayed when it has in tow another vessel or craft of such height as to require the opening of the bridge, or when, because of the stress of weather, prompt opening is necessary.

(g) Trains, vehicles, vessels or other watercraft shall not be stopped or manipulated in a manner hindering or delaying the operation of the draw, but all passage over the drawspan or through the draw opening shall be in a manner to expedite both land and water traffic.

(h) The regulations in paragraphs (a) to (g) of this section apply only to commercial or pleasure vessels. Steamers or vessels employed or controlled by the United States Government, State government, or by municipal departments shall be passed without delay through the draws of said bridges at any hour of the day or night, upon giving four blasts of the whistle.

(i) Clearance gages of a type to be approved by the district engineer, Engineering Department at Large, in charge of the locality, shall be provided by the owner of each bridge and be kept in good legible condition. Unless otherwise specified, such clearance gages shall consist of two board gages painted white with black figures not less than 9 inches high, which shall indicate the headroom clearances under the closed span at all stages of the tide. These gages shall be illuminated at night and during the time of

fog, rain and snow. These gages shall be so placed that they will be plainly visible to the navigator of a vessel approaching the bridge either up or downstream.

33 U. S. C. 494

[Regs., July 8, 1933, Mar. 31, 1934, as amended Sept. 27, 1934, and at 12 F. R. 4963, 13 F. R. 8740]

§ 494. Obstruction of navigation; alterations and removals; lights and signals; draws; tolls.

No bridge erected or maintained under the provisions of sections 491-498 of this title, shall at any time unreasonably obstruct the free navigation of the waters over which it is constructed, and if any bridge erected in accordance with the provisions of said sections, shall, in the opinion of the Secretary of the Army, at any time unreasonably obstruct such navigation, either on account of insufficient height, width of span, or otherwise, or if there be difficulty in passing the draw opening or the drawspan of such bridge by rafts, steamboats, or other water craft, it shall be the duty of the Secretary of the Army, after giving the parties interested reasonable opportunity to be heard, to notify the persons owning or controlling such bridge to so alter the same as to render navigation through or under it reasonably free, easy, and unobstructed, stating in such notice the changes required to be made, and prescribing in each case a reasonable time in which to make such changes, and if at the end of the time so specified the changes so required have not been made, the persons owning or controlling such bridge shall be deemed guilty of a violation of said sections; and all such alterations shall be made and all such obstructions shall be removed at the expense of the persons owning or operating said bridge. The persons owning or operating any such bridge shall maintain, at their

own expense, such lights and other signals thereon as the Commandant of the Coast Guard shall prescribe. If the bridge shall be constructed with a draw, then the draw shall be opened promptly by the persons owning or operating such bridge upon reasonable signal for the passage of boats and other water craft. If tolls shall be charged for the transit over any bridge constructed under the provisions of said sections, of engines, cars, street cars, wagons, carriages, vehicles, animals, foot passengers, or other passengers, such tolls shall be reasonable and just, and the Secretary of the Army may, at any time, and from time to time, prescribe the reasonable rates of toll for such transit over such bridge, and the rates so prescribed shall be the legal rates and shall be the rates demanded and received for such transit. (Mar. 23, 1906, ch. 1130, § 4, 34 Stat. 85; Mar. 4, 1913, ch. 141, § 1, 37 Stat. 736; 1946 Reorg. Plan No. 3, §§ 101-104, eff. July 16, 1946, 11 F. R. 7875, 60 Stat. 1097.)

33 U. S. C. 499

§ 499. Regulations for drawbridges; penalties for violation; enforcement.

It shall be the duty of all persons owning, operating, and tending the drawbridges built prior to August 18, 1894, or which may thereafter be built across the navigable rivers and other waters of the United States, to open, or cause to be opened, the draws of such bridges under such rules and regulations as in the opinion of the Secretary of the Army the public interests require to govern the opening of drawbridges for the passage of vessels and other water crafts, and such rules and regulations, when so made and published, shall have the force of law. Every such person who shall willfully fail or refuse to open, or cause to be

opened, the draw of any such bridge for the passage of a boat or boats, or who shall unreasonably delay the opening of said draw after reasonable signal shall have been given, as provided in such regulations, shall be deemed guilty of a misdemeanor, and on conviction thereof shall be punished by a fine of not more than $2,000 nor less than $1,000, or by imprisonment (in the case of a natural person) for not exceeding one year, or by both such fine and imprisonment, in the discretion of the court: *Provided,* That the proper action to enforce the provisions of this section may be commenced before any commissioner, judge, or court of the United States, and such commissioner, judge, or court shall proceed in respect thereto as authorized by law in case of crimes against the United States: *Provided further,* That whenever, in the opinion of the Secretary of the Army, the public interests require it, he may make rules and regulations to govern the opening of drawbridges for the passage of vessels and other water crafts, and such rules and regulations, when so made and published, shall have the force of law, and any violation thereof shall be punished as hereinbefore provided: *Provided further,* That any regulations made in pursuance of this section may be enforced as provided in section 413 of this title, the provisions whereof are made applicable to the said regulations. (Aug. 18, 1894, ch. 299, § 5, 28 Stat. 362; June 13, 1902, ch. 1079, § 6, 32 Stat. 374.)

33 U. S. C. 512

§ 512. Obstruction of navigation.

No bridge shall at any time unreasonably obstruct the free navigation of any navigable waters of the United States. (June 21, 1940, ch. 409, § 2, 54 Stat. 498.)

APPENDIX H

Testimony

WILLIAM AIRD HAWKINS, called by the libellant, having been first duly sworn, testified as follows:

Direct examination by Mr. McCarter:

Q. Where do you live, Captain Hawkins? A. 6 Victoria Terrace Glasgow, Scotland.

Q. How are you employed? A. I am employed by Shell Tankers Limited, London, as Master.

Q. When did you first get your license as a Master? A. 1943.

Q. When did you first get your first berth as a Master? A. 1949.

Q. Between 1949 and the present, have you been serving continuously as a Master? A. Yes.

(3)* Q. Has all of that period been on the high seas or have you had any ashore? A. Two years in shore capacity in Venezuela.

Q. And do I understand that the balance of that time was on the high seas? A. Yes.

Q. How long were you in the merchant marine prior to getting your Master's license? A. Sixteen years.

Q. On December 20th, 1957, would you state what your assignment was? A. I was Master of the motor tanker, Lembulus.

Q. Who was the owner of the Lembulus? On that day. A. This Shell Petroleum Company, Limited, London.

Q. Will you tell us very briefly what was the approximate size of the Lembulus. A. The Lembulus was approximately 445 feet long and 55 feet wide.

*All figures in parentheses indicate the number of each new page of the stenographic transcript.

Q. And approximately what was its tonnage? A. Approximately 6,600 gross tonnage.

Q. How long had you been assigned as Master? Of the Lembulus. Since what date in other words. A. November, 1957.

* * *

(7) Q. Now, before disposing of this particular exhibit, can you identify on this chart the location of the Lincoln Highway bridge spanning the Hackensack River? A. This is the Lincoln Highway bridge here (pointing).

Mr. Carter: Let the record reveal that he is pointing to a bridge marked with a circle in ink. I might add, for the record, that these marks were placed on it at a prior deposition.

The Court: You have no objection to that marking? Have you, Mr. D'Auria?

Mr. D'Auria: No, sir. None at all.

Mr. McCarter: Now, for schematic purposes only, and I specifically state that this is not intended as a scale diagram. To the extent that we require a scale, we can refer to the chart. I now have a photostatic blowup of the area of the Hackensack River between the Copper's Wharf point already identified and slightly beyond the Lincoln Highway bridge, and I would ask that purely for the purposes of demonstration, and not as a scale designation in any way, that we admit this into evidence since it will be far easier to show the movements of the ship on something of this size than on a very small map.

The Court: Mr. D'Auria?

(8) Mr. D'Auria: No objection, Judge.

The Court: Very well. Let it be marked P-2.

(Photostatic blowup marked Exhibit P-2 in evidence.)

Q. By reference to Exhibit P-2, Captain, using a blue pencil, will you please designate on the chart the position of the Lembulus at about three p.m. on December 20th, 1957, as she was moored as you have testified to Copper's Wharf.

The Court: I assume we recognize, of course, that the location of the vessel will not be to scale.

Mr. McCarter: Not at all. There is no attempt at scale in the use of the diagram.

(Witness marks.)

* * *

(27) Q. Now, Captain, what were the conditions of wind and tide at this time? A. There was a squally southeasterly wind and occasional rain showers. The vessel was stemming the tide.

Q. By which I take it in landlubber language you mean the tide was coming in. A. Yes.

* * *

Q. Did you make any signals to that bridge, warning them of your approach? A. Yes.

(28) Q. At about what time did you make that signal, do you recall? A. At about 1553, approximately.

Q. Where were you in relation to the Pulaski Skyway when that signal was made? Were you north of it or south of it, or where? A. Just about to pass under it, slightly.

Q. What signal did you make to the bridge? A. Three blasts.

Q. Can you state what the bridge did thereafter? A. The bridge answered our signal and commenced lifting almost immediately.

Q. And between the time that it started lifting and the time that you have testified that you changed your speed from harbor full ahead to a slower speed, what did you observe with reference to the bridge? A. That it was continuing to lift.

Q. Now, will you state what the purpose of reducing the speed was?

Mr. D'Auria: Your Honor, there again, what was the purpose of reducing speed? Was the speed reduced?

Mr. McCarter: He has testified it was.

The Court: He reduced to dead slow ahead.

Mr. D'Auria: What is the purpose? I think the (29) question should not be asked that way. It is leading.

The Court: I think the objection may be well-taken, for this reason: that the witness was not at the helm and the officer who was in charge—who gave the order—but the witness didn't give the order, but the officer who gave the order would be the only one competent to give the reasons.

Mr. McCarter: I will clear that up. I think the objection is well-taken because I have not laid the foundation.

Q. Captain, during the time, all this time that you have testified to, during the time that the vessel was passing down the river, where were you located on the vessel? A. On the bridge.

Q. And you testified that a pilot was aboard. Will you tell us whether or not that pilot was in charge of the vessel

at that time, or whether you were in charge of it? A. I was in command.

Q. If the pilot had given an order with which you disagreed, did you have authority to countermand that order? A. Yes.

Q. At the time the orders were given to the helmsman, who, in fact, gave those orders during this period? A. The pilot.

Q. And were you present when he gave all those orders? (30) A. Yes.

Q. Well, now, I re-offer the last question. I believe I have laid a foundation to show that, in fact, the orders were made in the presence of the Captain, with his approval.

The Court: Do you object to that?

Mr. D'Auria: I still object to it.

The Court: The question is, why was the speed reduced, wasn't it?

Mr. D'Auria: Yes.

The Court: That is the one you objected to because it calls for a memory operation on the art of the pilot who gave the order, is that right?

Mr. McCarter: I respectfully suggest it does not. It is a question of competency of this witness, by reason of his experience and responsibility at the time, being the Master of the vessel, in charge of conning it down that channel, and what is the purpose from the point of view of conning a vessel down a tight channel of doing what he did at the time it was done. I believe we have laid a foundation by showing every single order that was ever given to the helmsman, given with the actual approval of this Captain, and, therefore, with the knowledge and the consent of the Captain, as to the purpose, and what it was intended to accomplish.

(31) The Court: The difficulty is that the actual giving of the order was by a person other than the witness and, although the witness approved thereof, he obviously would not know what was in the mind of the pilot who gave the order. You may bring out what you are seeking to bring out in a different way, but it seems to me that the objection to the form of the question must be sustained and that will be the ruling.

Mr. McCarter: All right, sir.

Q. At the time you testified you reduced the speed from harbor full ahead, will you testify what was the next required maneuver as you then saw it with reference to the passage of that vessel down the river. A.——

Mr. D'Auria: I then object to that because he says "as you saw it," and the testimony is that the pilot gave all these orders, although the Captain was the Master of the vessel here. The pilot was doing the work and doing a job, and all this Captain did was stand on the bridge with the pilot.

The Court: I will overrule the objection to that question. You may answer.

Mr. D'Auria: You see the further part of the background may be—having taken these depositions—that there must be something further that is brought out with (32) reference to this Captain on this bridge—and as the testimony will further bear out, that this was his first time in this channel, that the pilot, as he testified before in the deposition, gave all the orders.

Mr. McCarter: I object to those comments.

The Court: Just a minute. I will adhere to my ruling. You may attack the credibility and competency of the present witness on your cross examination, but for

the purpose of direct and upon the objection made, I will adhere to my ruling. Go ahead. Next question.

(Record read back.)

The Court: Did you approve of the order of the pilot to the engine room to reduce to dead slow ahead at 1553-½, as you approached the Lincoln Highway bridge?

The Witness: Yes.

The Court: What circumstances within your view induced you to approve that order?

The Witness: The vessel had to pass under the Lincoln Tunnel Highway bridge which is a lift bridge with comparatively narrow piers to pass through, and the ship had to arrive in a position and at a speed whereby she could be safely navigated between the piers on the bridge.

(33) And how far to the north of the draw of the Lincoln Highway bridge was the vessel when she shaped her course for the draw? A. She would approximately be in this position where she could have a straight run through the piers.

Q. That would be approximately how far to the north of the bridge? Could you tell us from your observation at the time? A. Approximately four ship-lengths away.

The Court: All right. That would be 1600 feet, wouldn't it, sixteen or seventeen hundred feet?

The Witness: Eighteen hundred feet.

The Court: Yes, and how far to the north of the draw was her bow when she was—when her speed had been reduced under the order to dead slow ahead?

The Witness: She was in the vicinity of the Pulaski Skyway.

Q. The Pulaski Skyway? A. Yes.

Q. How far to the north of the draw was the bow of the vessel when she blew for the draw, when she signalled for the draw? A. Just north of the Pulaski Skyway.

The Court: All right. Go ahead.

(34) Q. Well, now for schematic purposes only, Captain, will you put on the chart the very approximate location of the vessel at the time the speed was reduced from harbor full ahead that you have already testified? A. 1553-½ slow ahead and dead slow. The vessel would be approximately at this position here, just north of the Pulaski Skyway.

Q. Label that, if you will, please.

I take it that is the time you have already testified to, approximately the time that the signal was made to the bridge? A. Yes.

Q. Well, now, would you give the speed orders made to the engine room between the time the speed was reduced from harbor full ahead to the time that she finally arrived at the Lincoln Highway bridge. A. At 1554, the engine was stopped. At 1555, dead slow ahead and stop; 1556, full astern, and at 1557, the top mast, the forward top mast hit the Lincoln Highway bridge.

* * *

(41) The Witness: At the time when the ship was approximately one ship's length north of the bridge?

The Court: Yes.

The Witness: I observed that the bridge had stopped lifting.

Q. Prior to that time, Captain, had the bridge been moving upward continuously between the time it first started to move and until you saw it stop, as you testified? A. Yes.

Q. Captain, were you in command of this vessel when (42) it moved up the Hackensack River to the Copper Wharf? A. Yes.

Q. And of course you had to pass under this same bridge then, obviously? A. Yes.

Q. Have you, in your experience in these many, many years in the merchant marine, had occasion to be under fixed or draw bridges very much? A. Yes.

Q. How would you describe the quantum of that experience? How much experience have you had? A. I suppose you could say I have passed under lift bridges and fixed bridges several dozen times.

Q. Will you state to the Court what in your experience is the ability of a person standing on the bridge of a vessel to judge whether or not you were going to clear a bridge as you approach it? A. It is almost impossible until you are in a position where you can't do very much about it. It is almost impossible to tell whether you will clear a bridge when you are passing under it until you are in an impossible position to do anything about it.

Q. Let me also ask you this: you have testified already that when you saw that the ship was not going to clear the (43) Lincoln Highway bridge, you sent the first mate out to do some warning, and you have also testified that a movement order was made from the bridge to the engine room of full speed astern. Will you tell us what the effect on the maneuver of this particular is or was at that date of an order of full speed astern? A. A movement of full astern would cant the ship's head to starboard and her stern to port.

Q. Can that be compensation by the use of the rudder? A. No.

Q. And how long approximately would it take under the conditions that existed to bring the vessel to a halt by the use of full speed astern? A. About five minutes.

Q. Will you testify whether or not the use of full speed astern—I withdraw that question—will you testify now as to just how long under the conditions then existing you could safely have used full speed astern? A. Not more than a minute.

Q. What would have happened under the conditions then existing had you used it for longer than that? A. The vessel would have canted to starboard. The bow would have hit the pier on one side, and, as she continued to make headway through the pier, the stern would have gone over to the port and the rudder and propeller would be in (44) danger of striking the pier on the other side.

* * *

(49) Q. Will you tell us whether or not the conditions of wind and tide, and I believe we have already found that the tide was coming in and the wind was southeast and squally, will you state whether or not those conditions would have any affect on your ability to maintain steerageway in the channel? A. Yes.

Q. To what extent, sir? A. To the extent that the vessel would have to be travelling at a sufficient speed to maintain her position in the channel to line up correctly for passing through the bridge and a speed that would give her sufficient steerageway to maintain her position.

Q. Is there any peculiar navigational conditions that exist in the draw of a bridge in a river such as that at that time? I believe that can be answered yes or no. A. Yes.

Q. What is that condition? A. That it is preferable—or rather essential, in order to maintain the ship in the

middle of the draw, that the engine be going ahead so as to give the maximum response to the rudder movements.

(50) Q. Is there any particular condition in the water or current of the river which is created by the existence of the piers of the bridge? A. There would be a tendency for there to be, in the particular case where we had the tide coming in, for the water to be running a bit faster than it would in a wider part of the river.

Q. Faster where? A. Against the ship, running to the north.

Q. In the draw, you mean? A. Yes.

* * *

(138) (Books marked Exhibits P-10 and P-11 in evidence.)

* * *

WALFRID WAXIN, called as a witness in behalf of the plaintiff, having been first duly sworn, testified as follows:

Direct examination by Mr. Julian:

Q. What is your address, Captain Waxin? A. 539 85th Street in Brooklyn.

Q. What is your occupation? A. I am a tugboat captain.

(146) Q. Who is your employer? A. Moran Towing and Transportation Incorporated.

Q. Captain, would you tell the Court what licenses and what pilot that you hold? A. Well, I have a pilot license, 500 tons, for all of New York harbor, including Jamaica Bay and Raritan Bay, Staten Island Sound, Newark Bay, Hudson River to Troy of Buzzard's Bay, Cape Cod Canal, Cape Cod Bay, Boston Bay, and all of Greater Boston Harbor.

Q. When did you first start tugboating? A. 1937.

Q. When did you first become captain of the tugboat? A. I got my original license in 1941 and went into the pilothouse at that time.

Mr. D'Auria: Went into what?

The Court: Pilothouse.

Mr. D'Auria: What?

The Court: That is the little place where the little wheel is on the tug.

Q. On December 20, 1957, I understand you were employed by Moran Towing, is that right? A. That's right.

Q. What was your tug, the name of your tug? A. The name of the tug that I was on at that time was the (147) Kathleen E. Moran.

Q. Do you remember on that day assisting and undocking the Lembulus? Did your tug assist in the undocking of the Lembulus? A. The tug did assist in undocking the Lembulus.

Q. That was at Kearny Point? A. At Copper's Coke is the departure point.

Q. Well, after the Lembulus was undocked and proceeded seaward down the Hackensack River, would you tell us what your tug did? What did you do with your tug? A. After the ship was turned around and headed downstream, we followed the ship down toward the Pulaski Skyway and Lincoln Bridge.

Q. On that trip down the Hackensack River, was there a collision? A. Yes.

Q. What time was that collision? A. I have a notation that it is 1555 in my little book.

Q. You mean you used something to refresh your recollection? A. Yes. I have a notation of it in my little day book.

Q. Would you produce that, please.

Captain, what is that document that you have in your hand? A. That is a diary.

(148) Q. Your personal diary? A. That is my personal book.

Q. And from that diary—when did you write that entry in there? A. That entry is written on Friday, December the 20th, in 1957.

Q. The collision that you refer to and mentioned as being at 1555, was that the Lincoln Highway bridge?

Mr. D'Auria: Your Honor, I am going to object to any leading question.

The Court: All right; don't lead. Objection sustained to the form of the question. Reframe it. Where was that collision?

Q. Where was the collision? A. The Lembulus hit the Lincoln Highway bridge and bent two masts.

Q. Did you see the collision yourself? A. Yes.

Q. Just before the collision, had you seen the bridge rising, going up? A. Yes, I had.

Q. Will you tell the Court what you saw? A. I saw the bridge start to rise to what appeared to me to be in the usual fashion of bridges rising. Then to slow down to such an extent that it was hard to tell whether the bridge (149) was still rising or had stopped.

Q. Captain, did you, as you followed the Lembulus down, were you on the port, starboard side, or directly astern? A. Following the Lembulus down, we stayed behind the Lembulus.

The Court: May I interrupt you a moment? Captain Waxin——

The Witness: Yes, your Honor.

The Court: —when you observed this bridge slowing to a degree which made it difficult or impossible for you to tell whether it was still rising or it had stopped, were you in a position to tell us—are you in a position to tell us how far north of the drawbridge section of the bridge the bow of the Lembulus was?

The Witness: That's very difficult to tell or judge that; but I'd say perhaps a ship length.

The Court: All right, go ahead.

Q. As you followed the Lembulus down, could you see her propeller as it turned? A. Yes.

Q. Would you tell the Court what, if anything, you saw the propeller do? A. Well, as we approached the bridge, it was evident that the opening procedure was slowing down. I noticed that the wheel of the Lembulus went into reverse. At that time, we went by the starboard quarter and up alongside of the Lembulus (150) on the starboard side.

Q. Well, at that time when you saw the wheel go into reverse, would you estimate in the same fashion as before, for the Court, how far away was the Lembulus at that time? A. Well, I would say that was just about the time or shortly after; so it must be just perhaps a little bit less than boat-length, say 350 feet or so.

Q. Did you observe the speed of the Lembulus as she approached the Lincoln Highway bridge? A. At that time, it seemed to me moving very slowly, but I wouldn't guess any actual speed.

Q. Well, from your experience as a pilot, and a tug-boat captain, would you say there was anything unusual about the speed of the Lembulus as she approached the Lincoln Highway bridge? A. Not at all.

The Court: How far out of water was her screw at the time you noticed it going in reverse?

Excerpts from Deposition of C. Peschken, Read into Record

The Witness: I don't know, your Honor, whether the screw was out of the water or not. I just noticed the commotion of the water.

Mr. Julian: Your witness.

* * *

Mr. McCarter: These are photographs—

Mr. D'Auria: No objection, sir.

The Court: All right.

Mr. McCarter: These are photographs taken of and in the bridgehouse. I would suggest they be marked as one exhibit, perhaps labelling them A, B, C, and D.

The Court: I guess.

(177) (Marked in evidence P-13-A, B, C, and D.)

* * *

Now reverting to the cross examination of Mr. Peschken at line 9, page 66:

"Q. Mr. Peschken, I have had handed to me a mimeographed booklet, which I understand is a Book of Rules and Regulations of the New Jersey Highway Department Drawbridges, consisting of 12 pages. I show this to you and ask you whether or not you can identify it?

"A. I do.

"Q. What is it?

"A. It is a book of rules and regulations.

(179) "Q. Just what I said, in other words?

"A. Yes.

"Mr. McCarter: Will you mark that, please, Mr. Reporter.

"(Above-mentioned Book of Rules and Regulations was received and marked Exhibit P-5 for identification.

* * *

"Q. Now, I am on a page which is numbered 8 of this Book of Rules and Regulations, and this is entitled 'Rules Governing Procedure in Opening and Closing Drawbridges' and I note that rule 2 states, 'If opening is delayed abnormally due to traffic conditions or to failure of equipment, the signal of two blasts to be repeated at intervals until the draw can be moved.'

* * *

"Q. Now, you have testified, Mr. Peschken, that (193) you did not at the time of this accident give the three-blast signal on starting to open the span, and you also testified that instead you did in fact give a two-blast signal. Is that your customary procedure whenever you operate the drawbridge?

"A. Yes.

"Q. I couldn't hear your answer.

"A. It is.

"Q. So that there was nothing abnormal at all about your procedure in this particular case?

"A. Not a thing."

* * *

(299) Q. I think I have had my answer. Now, you also testified at that prior discovery proceeding, did you not, sir, that the procedure you followed with respect to the approach of the Lembulus was completely normal in every respect? A. That's right.

* * *

(248) JERRY IANNACCONE, called as a witness in behalf of the defendant, having been first duly sworn, testified as follows:

Direct examination by Mr. D'Auria:

Q. Mr. Iannaccone, what is your address? A. 15-01 George Street in Fair Lawn, New Jersey.

Q. And you are employed by the State of New Jersey, sir? A. That's right.

Q. In what capacity? A. District Electrical Supervisor.

Q. Were you notified about any electrical difficulty on the Hackensack or Lincoln Bridge? A. I was.

Q. Can you say that that was sometime before December 20th?

Mr. McCarter: I object to this leading question.

The Court: Yes, objection sustained. Don't lead.

Reframe it.

Q. About what time were you notified? A. Well, I can't recall exactly, but I was notified, I believe twice that there was some sort of trouble on that bridge.

Q. Can you tell us the year and the month? A. It was prior to December 20th of that year.

Q. 1957? A. That's right.

Q. Did you go to that bridge as a result of a call that (249) there was electrical difficulty? A. I did.

Q. Can you tell us what it was, sir; what the difficulty was?

The Court: Shall we find the time first? Can you fix the time when he went there.

Q. Can you tell us when you went? A. At the time, I couldn't tell, because whenever I went there and made an investigation, we made the test and we couldn't find anything. We tested the bridge at full speed and there wasn't any trouble. It was an intermittent trouble that didn't seem

to appear when we were there. We did find the trouble subsequently, after this vessel struck the bridge.

* * *

(250)

Q. Mr. Iannaccone, can you tell me just what this difficulty was and what was causing it? A. Well, at the time, I said I couldn't tell then. But now we know; and, of course, it's been corrected. It was in the control of the bridge; it was in the leveling control mechanism. The bridge has a leveling mechanism which keeps the bridge level, and if it goes out of level too much, it automatically stops the bridge.

* * *

Q. Now, at this three point power, which you say is 35 to 45 per cent of full speed, can you tell us approximately how long it would take, at that rate of speed, to lift the bridge from its traffic position to its full height, or the almost open height, rather? A. Well, I can't tell you exactly, but I could approximate it.

Q. Do your best. A. About four minutes, I believe.

Q. Are you aware that the Coast Guard puts out a publication known as "Notice to Mariners," which contains warning of any dangerous or potentially dangerous obstacles to navigation in the channel? A. No, I don't.

(256) Q. Do you know whether or not any report was made to the Coast Guard as to this potentially dangerous situation on your bridge? A. We didn't think it was dangerous.

Q. So far as you were concerned, you were the person who has the responsibility, I take it, of making that decision? A. That's right.

* * *

Q. Who would have the duty to report to your superior? A. I would.

Q. Did you so report? A. I reported that there was some sort of trouble there.

Q. And did you make a written report? A. No, I didn't.

Q. Is there any written report, to your knowledge, of this trouble? A. No, by me.

Q. By anybody? A. Well, I don't know if the bridge tenders report directly (260) but I didn't report it directly.

Q. You never made any— A. No.

Q. And none were made by your subordinates pursuant to your directions? A. Not that I know of.

Q. You say you did make a report to your superior. Do you remember when that was? A. No. It was a telephone conversation.

Q. Do you remember approximately when it was with reference—— A. Well, it was in that period before this accident occurred, about two or three weeks, that I was so notified.

Q. It was in that two or three week period? A. Yes.

Q. I see. Do you remember the nature of your report? A. I just told him there was some sort of—it was reported to me there was some sort of control trouble there, and every time I went there, I couldn't find it.

* * *

Q. And you felt it sufficiently important to make an order of that nature to him, but you did not feel it sufficiently important to advise the Coast Guard? Or give any other notice to vessels which were going to navigate that channel? A. That's right.

(269) Q. Is it your custom to give orders such as that without having any confirmation made in writing? A. That's right.

* * *

(271)

Q. No matter what kind of operation you used, whether emergency or regular, to open this bridge, I take it that ten minutes would be more than ample in any case to raise it to the nearly open limit, is that correct? A. You mean the time to open the span?

Q. Yes. A. Yes, ten minutes would be ample for both.

Mr. McCarter: All right, that is all.

* * *

Q. I show you Plaintiff's Exhibit 13-C, and ask you whether or not you recognize that? A. I do.

Q. What is it? A. That is notice of regulations that is tacked on the bridge.

Q. Was that there on December 20, 1957? A. It was.

Q. And that is, is it not, right in front of your operator's booth? A. Yes, it is.

Q. And rule 3 states, does it not, Mr. Peschken, "On vertical bridges, three blasts of the siren are to be given (four blasts for Government craft) when the span starts to rise", and so on; is that not true, sir? (288) A. That's right.

Q. And you testified that, in fact, you do not observe that regulation as a matter of course? A. That's right.

Q. Of course, it does say, does it not, down at the botton of this, in red letters, "Violation of any of them"—that is,

the rules—"shall be cause for disciplinary action." You are aware of that, sir? A. I am.

Q. And you take that risk nevertheless? A. Yes.

* * *

Q. And it is true, is it not, Mr. Peschken, that in this particular situation you did, in fact, start to lift the bridge earlier than you normally do for vessels approaching from the north? A. Did you say I did or didn't.

Q. Did, in fact? A. I did?

Q. Yes. A. Yes.

(296) Q. So that you had more than the normal time within which to complete the lifting operation, is that not so? A. That's right.

The Court: Was this emergency method of lifting the draw span electrical in character?

The Witness: That is right.

The Court: Separate systems?

The Witness: Separate systems.

The Court: Was that available for use that particular afternoon?

The Witness: It was.

* * *

APPENDIX I

Exhibit P 10 in evidence, record page 138. Captain Hawkin's Accident Report.

To Dept.: Nautical. M. S. "Lembulus".

Office Ref.: Port: New York.

Subject: Damage to fore & main topmasts. Date: 21st, December '57.

Enclosures:

Messrs. Shell Tankers Limited,
Ibex House,
Minories,
London. E. C. 3.

Dear Sirs.

I regret having to report that this vessel suffered damage to the fore and main topmasts whilst passing under the Lincoln Highway Bridge, Hackensack River, New York, at 1557 hours on the 20th, December 1957.

The "Lembulus" was outward bound from Koppers Wharf, Kearney Point, where she had completed discharging asphalt and, was ballasted to a draft of 13' 00" forward and 17' 00" aft. The tugs Catherine Moran and Pauline M. Moran were in attendance and the vessel was being piloted by Captain Basset, one of the senior pilots of the Moran Tug Boat Company. The weather conditions at the time were, fresh to strong squally southeasterly wind with frequent heavy rain showers.

From the time of leaving the berth four bridges had been safely negotiated and, on passing under City Bridge at

1546 hours the Pilot made the customary whistle signal to the Operators on Lincoln Bridge indicating that he wished to pass. They in turn answered with their signal indicating that they were in the process of lifting the bridge and, it was observed that they were in fact doing so.

The vessel continued her approach to Lincoln Bridge, being conned to pass midway between the piers, the bridge was continuing to rise and everything seemed to be proceeding normally. At 1555 hours it was noticed that the bridge had stopped rising and A movement of Dead Slow Ahead which had just been made was immediately followed by, Stop. At 1556 hours the vessel was in an impossible position right in the approach to the bridge before we began to have doubts of the masts clearing, and full speed astern was rung on the engines in an attempt to take the way off. This movement was followed by, Stop, (not recorded in the Bridge Movement Book) and immediately afterwards by, Emergency Full Speed Astern. The foretopmast hit the bridge at this time and a few moments later the main topmast hit too. After the foretopmast hit, the bridge resumed rising and continued to apparently rise to the fully lifted position after we had passed through. At 1603 it was noted that the bridge had been fully lowered to the closed position. The foretopmast hit the bridge about six feet below the truck and the main topmast about four inches below the truck. These figures were quoted in the Official Log Book Entry, made after the accident but, when the masts were removed in the repair yard the measurements were found to be nine feet ten inches and six inches respectively.

The foretopmast was badly bent just above the housing to an angle of about twenty-five degrees from the vertical and was further bent at a distance of nine feet

ten inches from the truck. The main topmast was bent backwards to a similar degree at a distance of four feet below the truck. The cowl on the gas line on the mainmast was knocked off. The foretopmast stay has been badly stretched but all other rigging appears to be undamaged.

Regarding the stop in the raising movement of the bridge, it may be that there was some temporary mechanical fault in the lifting mechanism but, at no time did the bridge Operators give any indication that there was anything amiss. The bridge is fitted with a warning whistle for such emergencies.

As soon as was practicable after the accident I contacted the Agents, Messrs. Furness Withy, and instructed them to advise Captain Baker-Beal and Messrs. Bethlehem Steel Corp. and to arrange for representatives of the Repair Yard to board as soon as possible after we arrived at St. George Anchorage. These messages were passed by Radio Telephone through the courtesy of the Captain of the tug, Catherine Moran.

The vessel continued down river without further incident and anchored at 1805 hours in a position with Fort Wadsworth Light bearing 166 degrees distant 1.8 miles.

I went ashore by tug after anchoring and gave Captain Baker-Beal the details of the accident and found that he had received my messages and had completed arrangements as requested. The vessel was scheduled to proceed to the repair yard at Staten Island at 1300 hours on the 21st. December.

I shall tender a full report on the repair proceedings as soon as possible.

I am.

Yours faithfully

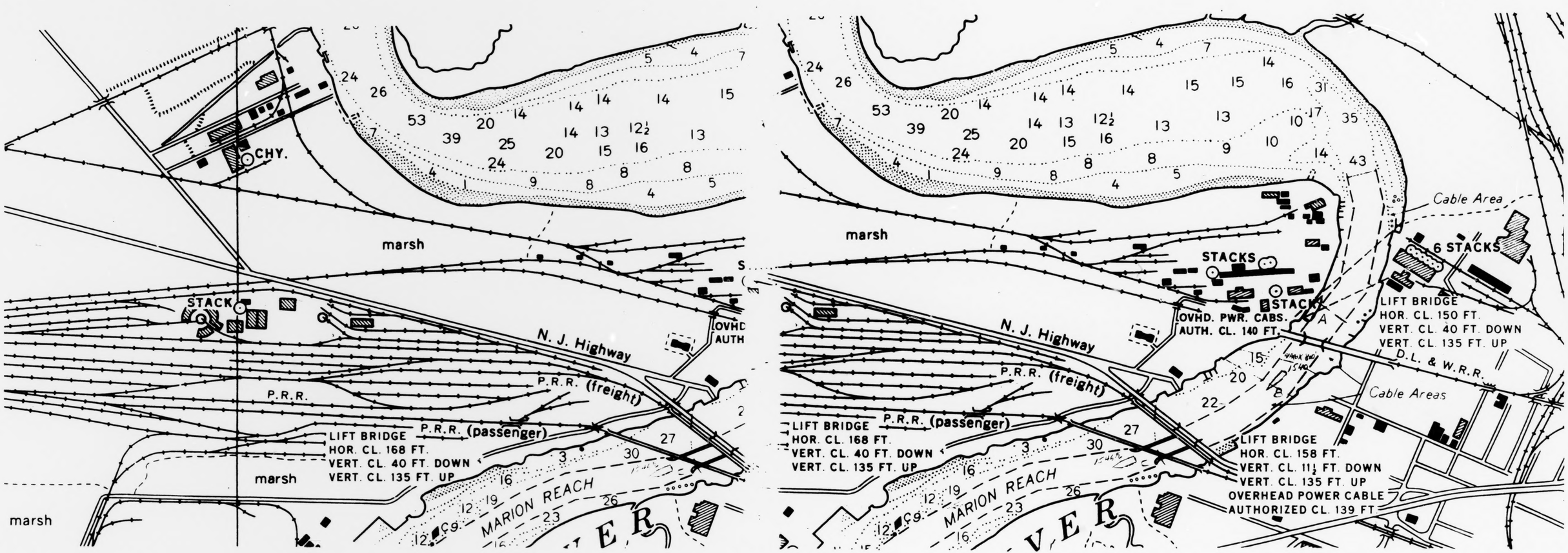
W. A. HAWKINS
(W. A. Hawkins)
Master.

Locations. Admiralty Chart No. 2580.
Berth. 40deg.44.8N, 74deg.4.6W.
Lincoln Bridge. 40deg.43.65N, 74deg.5.9W.

cc. Capt. A.C.C. Baker-Beal, Asiatic Pet. Corp., New York.
Mr. Robert M. Julian, representative from Messrs. Haight, Gardner, Poor & Havens, 80 Broad Street, New York 4, N. Y.

APPENDIX J

Exhibit P 2 in evidence, record page 8. An enlarged portion of a United States Coast and Geodetic chart relating to the Hackensack River upon which Captain Hawkins made various schematic markings showing the approximate location of the LEMBULUS at various times.


CHY.
marsh
STACK
N. J. Highway
P.R.R.
P.R.R. (freight)
P.R.R. (passenger)
LIFT BRIDGE
HOR. CL. 168 FT.
VERT. CL. 40 FT. DOWN
VERT. CL. 135 FT. UP
marsh
MARION REACH
marsh
OVHD
AUTH
STACKS
STACK
OVHD. PWR. CABS.
AUTH. CL. 140 FT.
Cable Area
6 STACKS
LIFT BRIDGE
HOR. CL. 150 FT.
VERT. CL. 40 FT. DOWN
VERT. CL. 135 FT. UP
D.L. & W.R.R.
Cable Areas
LIFT BRIDGE
HOR. CL. 158 FT.
VERT. CL. 11½ FT. DOWN
VERT. CL. 135 FT. UP
OVERHEAD POWER CABLE
AUTHORIZED CL. 139 FT

STACKS
General Pulaski Skyway
FIXED BRIDGE
HOR. CL. 300 FT.
VERT. CL. 135 FT.
marsh
LIFT BRIDGE
HOR. CL. 201 FT.
VERT. CL. 35 FT. DOWN
VERT. CL. 135 FT. UP
HACKENSACK
Pipeline and Cable Area
Lincoln Highway
Marion
Cemetery

MOTION FILE SEP 14 1961

IN THE

Supreme Court of the United States

OCTOBER TERM, 1961

No. 331

THE SHELL PETROLEUM CO., LTD.,
as owner of the m s LEMBULUS,
Petitioner,
against
CHARLES PESCHKEN,
Respondent,
and
CANOLIUS V. HINES and FRED W. BENTS

MOTION AND BRIEF OF SEAWAY EXCURSION LINES, INC., AS AMICUS CURIAE

RAYMOND A. BALLARD,
Counsel for Seaway Excursion Lines, Inc.,
Penobscot Building,
Detroit 26, Michigan.

Interstate Brief & Record Co., 356 Congress St. E., Detroit 26, Michigan

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MOTION FOR LEAVE TO FILE A BRIEF AS AMICUS CURIAE

To the Honorable, the Chief Justice of the United States and the Associate Justices of the Supreme Court of the United States:

Seaway Excursion Lines, Inc., respectfully moves this Honorable Court for leave to file the accompanying brief as *amicus curiae*. The consent of the petitioner has been obtained but the respondents have refused to consent to the filing of a brief by Seaway Excursion Lines, Inc. as *amicus curiae*.

The applicant, Seaway Excursion Lines, Inc., has an interest in this case in that it now has pending in the Supreme Court of the State of Ohio an appeal (Number 36938) from a decision of the Lucas County Court of Appeals of the State of Ohio (Number 5324) in the case of *The Toledo Terminal Railroad Company v. Seaway Excursion Lines, Inc., et al,* (Number 185429). The appeal in that case and in the case at hand both arise for the lack of a clear and definite statement by this court of the duties of the operators of bridges spanning heavily navigated waters. Further, it appears from the testimony in petitioner's case and in your applicant's case that bridge operators have come to understand that they may avoid liability for damage to passing vessels by refusing to give a "come ahead" or "all clear" signal to vessels signalling for passage notwithstanding the bridge may already be opening or may already be completely open. Such a practice is a perversion of signalling regulations duly established by federal authorities for the preservation of life and protection of property.

The decision of the Third Circuit Court of Appeals in petitioner's case perpetuates this perversion and must be countermanded by this court.

WHEREFORE, Seaway Excursion Lines, Inc. moves this Honorable Court for leave to file the attached brief as *amicus curiae*.

Respectfully submitted,

/s/ RAYMOND A. BALLARD,
RAYMOND A. BALLARD,
Counsel for Seaway Excursion Lines, Inc.,
Penobscot Building,
Detroit 26, Michigan.

Detroit, Michigan,
September 13, 1961.

BRIEF OF SEAWAY EXCURSION LINES, INC., AS AMICUS CURIAE

The facts and questions presented have been stated in petitioner's brief and need not be repeated here.

The *amicus curiae*, Seaway Excursion Lines, Inc., respectfully submits that a clear and definitive statement of the duties of operators of bridges spanning heavily navigated waters is necessary to reduce the increasing amount of personal injury and property damage arising from bridge-ship collisions and the increasing amount of litigation arising from such collisions. This statement is particularly necessary now that the Third Circuit Court of Appeals' opinion in this case has introduced uncertainty and conflict into the law. This court is the ultimate authority in matters maritime and, therefore, is the proper body to provide a final and binding statement of the duties of bridge operators.

UNCERTAINTY AND CONFLICT

Authorities in the Second Circuit (*Merritt-Chapman & Scott Corp. v. Cornell Steamship Co.*, 265 F. 2d 537, 1959) and in the Fourth Circuit (*Fort Fetterman v. South Carolina Hwy. Dept.*, 261 F. 2d 563, 1958, rehearing 268 F. 2d 27) hold that the rule of *The Pennsylvania*, 86 U. S. 125, is applicable to bridge and ship alike. The Court of Appeals here has refused to apply this rule notwithstanding the bridge operator blew one signal to the ship and then acted

as though he had blown another. *The Pennsylvania* rule would require the bridge operator to prove that this action "could not have" caused or contributed to the collision. This burden simply cannot be maintained on this record and accordingly it is serious error for the Court of Appeals to refuse to apply the rule of *The Pennsylvania* against the bridge operator as well as the ship.

PERVERSION OF FEDERAL REGULATION

In addition to, and perhaps more important than, the fact that the Court of Appeals' opinion introduces uncertainty and conflict into the law is the fact that it perpetuates perversion of the duly established federal regulations for the operation of drawbridges. It is clear from the facts of this case and from the regulations of the City of New York cited in petitioner's brief and from the testimony in the case involving your *amicus curiae* that bridge operators now frequently refuse to give any "all clear" or "come ahead" signals to vessels notwithstanding that the bridge may be opening or already open. This is done in the belief that any accident which may occur will necessarily be the fault of the ship for having approached the bridge without permission. Such a practice seems more detrimental to the public safety than having no federal regulations for the operation of bridges at all and makes a shambles of the once well established paramount right of navigation. This court is the only authority which can put an end to this dangerous practice and it is respectfully submitted that this court must do that without delay.

CONCLUSION

WHEREFORE, it is respectfully submitted that the petition for a writ of certiorari should be granted.

/s/ RAYMOND A. BALLARD,
RAYMOND A. BALLARD,
Counsel for Seaway Excursion Lines, Inc.,
Penobscot Building,
Detroit 26, Michigan,

Detroit, Michigan,
September 13, 1961.

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v.

CHARLES PESCHKEN,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit

BRIEF AND APPENDIX FOR RESPONDENT IN OPPOSITION

DAVID D. FURMAN,
Attorney General of New Jersey,
Attorney for Respondent,
State House Annex,
Trenton, New Jersey.

THEODORE I. BOTTER,
Assistant Attorney General,
AND
ELIAS ABELSON,
Deputy Attorney General,
Of Counsel.

Adams Press Corp 11 Commerce Street, Newark, N. J.—Market 3-8611-12

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BRIEF FOR RESPONDENT IN OPPOSITION

Opinions Below

The opinion of the District Court (Appendix A of Petition) is reported at 184 F. Supp. 950 (D. C. N. J. 1960). The opinion of the District Court denying motion for judgment in favor of respondent, Charles Peschken, notwithstanding the Court's opinion (Appendix B of Petition) has not been officially reported. The opinion of the Court of Appeals for the Third Circuit (Appendix C of Petition) is reported at 290 F. 2d 685 (1961).

Jurisdiction

The jurisdictional basis for the petition is 28 U.S.C. 1254 (1); however, petitioners do not satisfy the considerations necessary for the grant of a writ of certiorari by this court as set forth in Rule 19 (1b), in that the decision of the Circuit Court is correct, is in keeping with the decisions of this court and other circuit courts of appeals, and does not concern new and important principles which require this court's supervision.

Counter-Questions Presented

1. Does the decision of the Court of Appeals, holding that the vessel in question was negligent in continuing to approach the bridge despite the clear warning signal given by the bridge, conflict with the decisions of the Courts of Appeals of other circuits or of the Supreme Court of the United States?

2. Can the result below be sustained on various grounds, including the ground that the vessel's excessive speed was the cause of the accident, and, therefore, the points raised by petitioner would not alter the result on an appeal to this court?

Statute and Regulation Involved

33 U.S.C., §499.
33 C.F.R. 203.200 (1949).

Counter-Statement of the Case

On December 20, 1957 the vessel "Lembulus", owned by libellant, the Shell Petroleum Co., Ltd., sailed down the narrow and winding Hackensack River and ran into the Lincoln Highway Bridge. At the time of the collision the bridge was in the process of opening. Appellant, Charles Peschken, an employee of the New Jersey State Highway Department, was the Chief Drawbridge Operator of the bridge.

Libellant sued Peschken, as well as Canolius V. Hines, the gate attendant and Fred W. Bents, a bridge attendant, for damages to the vessel. Suit was not brought against the New Jersey State Highway Department, the owner of the bridge, presumably because of sovereign immunity of the State of New Jersey.

After trial and the submission of briefs by the parties, the lower court rendered a 17-page decision and opinion. The libel against Hines and Bents was dismissed by the lower court on the finding that there is "in the evidence no basis for concluding that any act or omission on the part of or chargeable to Hines or Bents contributed in the causation of the collision". No appeal was taken by libellant from the dismissal as to Hines and Bents.

The decision and opinion of the lower court found that Peschken, the bridge operator, was solely negligent and liable for the damages to the vessel. The Court found that the libellant, the owner and operator of the vessel, was not in the slightest degree liable or negligent or contributorily negligent, nothwithstanding that the vessel proceeded in violation of a two-blast signal from the bridge warning of possible delay in opening. The trial court held that in commencing to open the bridge after giving the two-blast signal, the bridge-tender countered the effect of the warning signal and invited the vessel to come ahead. The trial court expressed this novel rule of navigation as follows:

> "I find that by commencing the raising of the draw span immediately following his 'warning' signal, the physical raising of the bridge countered the effect of such warning, and served as an invitation to the vessel to proceed. See *Clement* and *The Kard*, *supra*. I can therefore find no basis for concluding that the vessel contributed in bringing about the collision, and am unable to relieve the drawbridge operator of responsibility for the occurrence." (Pb42)

The facts as found by the Court below show that the vessel signaled for the opening of the drawbridge by three blasts of its whistle. 33 C.F.R. 203.200 (d). The trial court further found that:

> "This signal was acknowledged by the Highway bridge, by two blasts of its horn (the prescribed warning of delay in opening the draw), but the draw span of the bridge nevertheless commenced to raise almost immediately." (Pb30)

There was testimony by the bridge tender and others that a second two-blast warning signal was given by the bridge. But, notwithstanding the warning signal from the bridge, the ship continued moving in a forward direction toward the bridge, and at an excessively high rate of speed. The bridge meanwhile continued to open slowly because mechanical difficulty was sometimes encountered when opening at high speeds. The District Court was not certain whether the bridge draw span actually stopped in its ascent or whether it simply slowed in speed. It indicated, however, that:

> "* * * when the draw section stopped in its ascent, or slowed to a point at which it appeared to have stopped, the bow of the vessel was then approximately her length away from the bridge abutment, and shaped for passing through the draw, at which time it first became apparent to her Captain that the top masts would not clear. Whether, therefore, the bridge draw span had actually stopped, or whether it had but slowed to an almost imperceptible speed, it was then too late for the vessel to avoid the collision, despite stopping her engines and then reversing their revolutions." (Pb41)

When it became apparent to the captain that a collision was imminent, the ship's engines were stopped and ordered

to full astern. They were going full astern when the collision ensued.

After the trial court's decision a motion was made by Peschken seeking (a) judgment in his favor notwithstanding the findings of fact and conclusions of law in the court's written opinion, (b) an order setting aside the findings of fact and conclusions of law in favor of libellant and against respondent, Peschken, on the grounds that the same were contrary to law, contrary to the evidence, contrary to the greater weight of the evidence and clearly erroneous in numerous material respects; or (c) in the alternative, if judgment is not entered in favor of all respondents, an order granting a new trial in view of the erroneous findings of fact and the finding of liability made by the trial court partly based on a theory regarding the use of alternate controls on the bridge, a basis of liability which was not fairly litigated and as to which there is insufficient evidence in the record to support a conclusion of negligence. In the motion, Peschken also requested that the court take judicial notice of certain records of the Coast and Geodetic Survey of the United States Department of Commerce, excerpts from which are contained in the letters annexed to the motion. These records pertain to the tide in the Hackensack River at the time of the collision. They indicate that it was "slack water" at the Lincoln Highway Bridge at the time of the accident. The tide was just beginning to change from low water to an incoming tide.

After oral argument, and additional briefs submitted by the parties, the trial court wrote a letter opinion modifying in some significant respects its earlier opinion. The trial court reaffirmed, nevertheless, the finding of liability against Peschken and the lack of liability, negligence or contributory negligence on the part of libellant based upon one theory: commencing to open the draw-span after giving the warning signal countered the signal and invited

the vessel to come on. From the decree entering judgment against Peschken and the denial of the aforesaid motion an appeal was taken to the Court of Appeals for the Third Circuit.

The Court of Appeals held that the ship was clearly at fault for approaching the bridge in the face of a warning signal properly given in accordance with controlling Federal regulations promulgated by the Secretary of the Army. The trial court's decision was reversed.

The basis for this holding was that the vessel was negligent in continuing to approach the bridge in the face of a two-blast signal warning of delay in opening the draw sufficient to allow passage of the vessel. The Court also indicated, however, that although the rule of *The Pennsylvania,* 86 U. S. 125 (1873) need not be invoked to decide the case before it, if the ship's failure to obey the signal contributed to the collision, *The Pennsylvania* rule also would bar recovery by her.

In deciding the case below, the Court of Appeals did so purely as a matter of law, accepting for the purpose of its decision the essential facts found by the trial court, namely, (a) that the vessel gave three blasts of her whistle while in the vicinity of the Pulaski Skyway, just north of the Lincoln Highway Bridge, (b) that the vessel's signal was answered by two blasts from the bridge (which signal may have been repeated), (c) that those in charge immediately began the process of opening the draw, (d) that no three blast signal was given to the vessel ("which would have indicated to the ship that she could come ahead"), (e) that thereafter the bridge mechanism either stopped or slowed down so that the draw was not fully opened at the time the vessel reached the bridge, and (f) the collision of the vessel's masts with the draw-span then occurred. 290 F. 2d at 686.

The court then decided the case after citing the applicable rule of the Secretary of the Army, 33 C. F. R. 203.200 (1949), saying (290 F. 2d at 687):

> "The Lembulus disobeyed the rule as is readily apparent from the statement of facts given above and reading the command set out in the rule. She signaled properly in approaching the bridge. But the bridge responded with the caution signal and under the rules that is the effective signal until removed by a three-blast signal from the bridge. It appears from the evidence that there had been some difficulty with the mechanism of the draw raising apparatus. The two-blast signal was quite proper under those circumstances and had it been obeyed the collision would not have occurred."

Now, in seeking a writ of certiorari, petitioner argues a new principle of law, one not applied by the trial court or the Court of Appeals (or by any other court to our knowledge). This principle is that the constant use of the two-blast signal by the bridge permits the vessel to ignore the warning or delay significance given that signal by the regulations of the Secretary of the Army and permits the vessel to come ahead as if a three-blast signal had been given or as if no warning delay signal had been given.

But this principle of law would itself violate the controlling Army regulations. Moreover it would seek to establish liability on principles of negligence law which would in turn require findings of fact not made by the trial court. The theory, if applicable at all, would require proof that the persons in charge of the vessel knew that the bridge would open properly, that no possibility of delay existed, that the two-blast signal was always given even in cases where there was no possibility of delay, and, relying on all these facts, the operators of the vessel then though it safe

to disregard the two-blast signal. Such findings of fact were not made by the trial court. They could not be made because no evidence was introduced to support this theory; it was not even argued in the trial court. The pilot of the vessel was not alive at the time of the trial, so his knowledge on this subject was unknown. Moreover, he may very well have known that the bridge was having difficulty with its opening mechanism and had stopped previously. Therefore, we can just as easily infer that he knew of the possible delay in opening the draw and that the two-blast warning signal was properly given by the bridge.

As a matter of fact, petitioner contended below in its brief that (a) the two blasts given by the bridge were not two *long* blasts (Petitioner's brief below, p. 27), (b) that, "we doubt, however, that any blasts were given at all"* (Petitioner's brief below, p. 27), (c) that Captain Hawkins, the vessel's master, "shouldn't be expected to know" whether the bridge tender gave a two-blast or a three-blast signal because Captain Hawkins is a "deep sea" Master, "who cannot be expected to know local regulations (Petitioner's brief below, p. 26).** It is strange that petitioner should now urge a principle of law based upon facts which petitioner denied below, namely, that a two-blast signal was actually given but that the operators of the vessel knew that such a signal was customarily given, that it could be disregarded, and that there were no delays that might occur in raising the bridge.

It is noteworthy that Captain Hawkins never *testified* that the signal from the bridge was other than a two-

---

* Note, however, that Captain Hawkins testified that his signal was answered by the bridge (Pb66).

** The voyage on December 20, 1957 was Captain Hawkins first trip on the Hackensack River, as brought out early in cross-examination (R11a).

blast signal. He merely said that "the bridge answered our signal." This is quoted in the trial court's opinion (Pb34); 184 F. Supp. at 954. No witness denied that the bridge gave a two-blast signal, but many witnesses affirmed this fact. However, there was no evidence that a three-blast signal was given at any time to invite the vessel ahead; in fact, Peschken in depositions denied giving a three-blast signal to the Lembulus (R31a).

There are two additional and essential facts worth noting which, however, were not necessary to the decision of the Court of Appeals. These two facts are: (a) that the vessel was traveling at an excessive speed down a narrow river at the time of the collision, and (b) that the bridge span did not actually stop. The evidence overwhelmingly demonstrates the truth of these two assertions of fact. Some of the evidence on these two points will be detailed in Point IV below.

The trial court found that the average speed of the vessel's approach to the bridge was 7.33 knots (Pb32) which is an extremely high speed on a narrow river. The trial court's opinion recognizes that the Master of the Lembulus, Captain Hawkins, "admitted that her average speed between the Skyway and the Lincoln Highway bridges was 9 knots" (Pb32). Captain Hawkins actually testified that his speed prior to the accident was 9 or more knots at a time when only 3.42 knots was necessary to maintain steerageway on the river. His testimony on this point is as follows:

> "Q. And from the position north of the Skyway to the position before the Lincoln Highway bridge, you were doing nine knots? A. Yes.
>
> Q. And a vessel of this size maintains steerageway at this speed for a distance of a mile? A. At what speed?

Q. At the 3.42 knots? A. Yes.

Q. Did you testify before that to maintain speed it had to be about four and a half or five knots to keep its steerageway? A. Yes.

Q. Can you do it at 3.42 knots? A. The point at issue here is—

Q. Please answer my question.

The Court: Can you do it at that speed?

A. Yes.

Q. At 3.42 knots instead of, as you testified before, (122) at five knots, four and a half to five knots, to maintain steerage? A. Yes."

At the trial, Captain Hawkins gave no explanation for putting his unloaded vessel at full-steam-ahead for six minutes, from 1547½ to 1553½, before reaching the Pulaski Skyway and for attaining a speed which he admitted was "almost the speed you would do in the open ocean" (R24a). This, in fact, was an essential cause of the accident, in addition to disregarding the bridge's two-blast signal. For there is no required speed for opening the bridge-span. The bridge may properly be slow moving or its opening may be delayed to traffic or other conditions. But once given a warning signal the vessel cannot continue to race at the opening draw-span. The vessel can and must slow its speed or go astern, if necessary. The bridge cannot move out of the way of a speeding vessel, but the vessel can, and must, slow its speed to afford the bridge time enough to open, after a warning of delay has been sounded.

As for the fact that the bridge span did not, in fact, stop during its ascent, as the evidence overwhelmingly demonstrates, this is an additional ground for putting the sole liability upon the vessel. The draw-span kept opening, although slowly as compared to the speed of the vessel. The vessel simply arrived too soon. Under these circumstances the vessel would be at fault even if it had been invited ahead by a three-blast signal from the bridge.

Lastly, the unreliability of petitioner's evidence (the numerous conflicts in Captain Hawkins' testimony, in the vessel's records, the alterations in the vessel's records, the failure to call but two weak witnesses) requires a denial of petitioner's claim. Petitioner failed to carry its burden of proof in the trial court. And, as noted above, petitioner offered no evidence whatsoever to support the argument now advanced on this appeal: that the vessel's operators were justified in ignoring the two-blast warning signal from the bridge.

ARGUMENT

POINT I

The decision below is clearly correct.

The Bridge Act of 1906, 33 U.S.C., §499, authorizes the Secretary of the Army to promulgate rules and regulations for the opening of drawbridges and the passage of vessels, which rules and regulations have the force of law. Pursuant to this statute, rules and regulations have been promulgated by the Secretary of the Army for the operation of the Lincoln Highway Bridge and are to be found at 33 C.F.R. 203.200. The applicability of the statute above cited and of the regulation promulgated in accordance therewith to the fact situation in the instant case has been recognized by both the District Court and by the Court of Appeals. In fact, counsel for both parties so stipulated that the Federal regulations were controlling and called for a two-blast warning signal in case of delay in opening the bridge (R54a).*

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* "Mr. McCarter: Of course, I think I can also concede—I don't want to make a big argument out of nothing here—I think I can concede safely that the rule with reference (278) to the use

(Continued on following page)

The controlling regulations provide that when a ship approaches a drawbridge spanning the Hackensack River it shall sound a signal signifying her intention to pass the bridge by three blasts of a whistle or horn. If the draw may be opened promptly, the bridge shall answer with three blasts of a whistle or horn. "In case of delay in opening the draw, * * * as may be necessary by accident to the machinery or other contingency, the signal from the vessel shall be answered by two long blasts of a whistle or horn from the bridge. In all cases when delay signals have been given, a signal of three blasts of a whistle or horn shall be given as soon as it is possible to open the draw." 33 C.F.R. 203.200(d) (Pb4).

Mention was also made in the District Court's opinion of regulations promulgated by the New Jersey State Highway Department for the operation of the drawbridge. These regulations, it was pointed out, require the repetition of the two-blast signal at intervals until the draw can be moved if the opening will be delayed abnormally. Naturally, such State regulations are valid only "so far as they are reasonable and do not conflict with any law of Congress regulating commerce or with the general admiralty jurisdiction conferred upon the courts of the United States". *Clement* v. *Metropolitan West Side El. Ry. Co.*, 123 F. 271 (7th Cir. 1903).

(Continued from preceding page)

of two blasts as a warning signal, which was referred to by Mr. D'Auria, was, in fact, the rule in effect on the date of this collision. I don't think there is any question about that. I think that is the only important part of this.

Mr. D'Auria: That's right.

The Court: Are you willing to so stipulate?

Mr. McCarter: I'll stipulate that.

The Court: That in case of difficulty with the bridge lift—

Mr. D'Auria: Case of delay, your Honor.

The Court: In case of delay in getting the bridge open, a two-blast warning signal is to be given by the bridge tender.

Mr. D'Auria: That's right."

The Court of Appeals, in analyzing the fact situation, found that the disobedience of the federal regulations by the Lembulus in continuing to approach the bridge in the face of the caution signal sounded by the bridge, and before that signal was removed by the three-blast signal, was "the substantial cause of the collision".

The two-blast signal, we submit, has been construed as setting forth an absolute direction to the approaching vessel to stop. In *Linde-Griffith Construction Co.* v. *The Authentic*, 210 F. 2d 757 (2d C. A. 1954), the court stated at 758:

> "The tender of the Susquehanna bridge answered with two blasts *to forbid the nearer approach of the tug and tow* because rail traffic was using that bridge." (Emphasis added.)

33 C.F.R. 203.200 (1949) declares that the effect of the signal continues "*in all cases*" until such time as it is possible to open the draw and "a signal of three blasts * * * shall be given * * *". (Emphasis added.)

It is obvious that "possible *to open* the draw" must refer to a sufficient opening to permit complete clearance of the vessel. To require that a signal be given to a ship to proceed when, for example, the power of the mechanism to open the draw is limited to less than a full opening is to invite disaster. Only when the draw may be properly and fully opened is such a signal authorized.

We agree with the statement in the trial court's opinion (Pb36), that the "duty of the bridge operator to signal if the draw cannot be opened at all is the same as that required if the draw cannot be opened sufficiently to permit the vessel's passage without contact therewith." *See: The Kard*, 38 F. 2d 844 (D. C. Pa. 1930). We also agree with the court's citation of the controlling principles of law as stated in *Clement* v. *Metropolitan Westside Elevated Rail-*

way Co., 123 Fed. 271, 273 (7th Cir. 1903) and repeated in *Munroe* v. *City of Chicago*, 194 Fed. 936, 940 (7th Cir. 1912), as follows:

> "If for any reason the bridge cannot be opened, proper signals should be given to that effect, such as will warn the approaching vessel in time to heave to. A vessel, having given proper signal to open the bridge and prudently proceeding under slow speed, has, in the absence of proper warning, the right to assume that the bridge will be timely opened for passage. She is not bound to heave to until the bridge has been swung or raised and locked, and to critically examine the situation before proceeding (City of Chicago v. Mullen, 54 C. C. A. 94, 116 Fed. 292), *but may carefully proceed at slow speed* upon the assumption that the bridge will open in response to the signal, *and may so proceed until such time as it appears by proper warning, or in reasonable view of the situation, that the bridge will not be opened* (Manistee Lumber Company v. City of Chicago [D. C.] 44 Fed. 87; Central Railroad Company of New Jersey v. Pennsylvania Railroad Company, 8 C. C. A. 86, 59 Fed. 192), *when it becomes the duty of the vessel, if possible, to stop, and, if necessary, to go astern.*" (Emphasis added.)

Unfortunately the trial court failed to apply these principles of law to the case at bar. The court modified the rule so as to allow the vessel, in effect, an option to heed the warning signal or to accept the commencement in the opening of the draw as the equivalent of a three-blast signal to come ahead. We submit that the regulation does not give this discretion to the vessel. It is the bridge tender who must decide when to blow the three-blast signal for the vessel to come ahead. It is the bridge tender who must determine whether the draw is to be opened immediately, whether there will be delay in (fully) opening the draw be-

cause of traffic conditions, accident to the machinery or other contingency. The bridge tender cannot create a signal system of his own. Nor can the vessel. The vessel cannot deprive the bridge tender of the right to determine when to give the three-blast signal and to determine when it is safe to invite the vessel to proceed.

Our courts have long recognized the need for maintaining an undeviating procedure in a system of nautical signals. Speaking to this question, the United States Supreme Court in *The Pennsylvania*, 86 U. S. 125, 135-7 (1873) said:

> "In the case of *The Emporer*, it was said: 'It is not advisable to allow these important regulations to be satisfied by equivalents, or by anything less than a close and literal adherence to what they prescribe.' * * *
>
> "To go into the inquiry whether the legislature was not in error—whether, in fact, a bell did not give notice to the steamer that the bark was where she was as soon as a foghorn would have done—is out of place. It would be substituting our judgment for the judgment of the law-making power. It would be admitting the validity of an equivalent for that which the statute has made a positive requirement."

Thus, the holding of the Court of Appeals is consistent with long-established case-law on the subject. Navigation rules regarding signals must be strictly applied.

In 1885, Judge Brown, speaking in *The Nereus*, 23 F. 448 (D. C., S. N. N. Y. 1885) declared:

> "In a crowded harbor * * * the use of signals is indispensable. They constitute a language by which navigation is controlled. They are one of the chief means adopted in order to avoid collisions. Necessarily they control and supersede in some degree the general rules applicable in the absence of signals; and considering what is at stake in life and property, it is manifest that

> due care, attention and skill are as necessary in the use of signals as in the use of the helm, engine or sails; and any negligence as to the former is as perilous and as blameable as negligence in regard to the latter."

In a narrow, winding river, as in a crowded harbor, the opportunity to maneuver is limited. To disregard controlling signals is negligence *per se*, as a matter of fact as well as law.

In the *Conners Marine Co.* v. *N. Y. and Long Branch R. R. Co.*, 87 F. Supp. 132, 134 (D. C. N. J. 1950) the court states that, "it would seem logical that where a moving vessel collides with a drawbridge there is a presumption of negligence on the part of the vessel. *Arlington Ry. Bridge Co.* v. *Franco-Ottoman Shipping Co.*, 4 Cir. 1919, 259 F. 166." This proposition of law supports our statement that to depart from warning signals and to rely on implications and invitations through other conduct will create confusion. It would place an impossible burden upon the bridge. The bridge cannot move out of the way of an oncoming vessel. Attempting to open the draw-span as much as possible seems the safest course for a bridge operator to take after a warning signal is given to a vessel. In fact, Peschken was limited in his actions and his vision. Upon receiving notice of the approach of the vessel he gave the warning signal. He could do nothing else. From the position in which he operated the bridge, because of the superstructure of the bridge, he could not even see the vessel approaching (R59a). Nor can Peschken, the bridgetender, be held liable for defects in the lifting mechanism or other design of the bridge. He is not the owner of the bridge; he is not responsible for its design, its maintenance or repairs. He can merely open the bridge and warn vessels of the possibility of delay in opening. Surely, then, he should not be held liable when he gave the proper warning signal, and it was ignored by the vessel.

POINT II

The decision by the Court of Appeals for the Third Circuit is not in conflict with the decisions of the Courts of Appeals of the United States.

A. The cases relating to a failure to exchange proper signals support the holding of the Circuit Court.

The findings of fact of the trial court as affirmed by the Court of Appeals showed that the bridge sounded a two-blast warning signal (in conformity with applicable Federal regulation) in response to the approach signal sounded by the vessel. Despite this warning, the trial court found as a matter of law that the slow ascent of the drawbridge constituted an invitation to the vessel to approach. The trial court referred to five cases dealing with signal situations: *The Kard*, 38 F. 2. 844 (D. C. Pa. 1930); *Clement* v. *Metropolitan West Side El. Ry. Co., supra; Munroe* v. *City of Chicago*, 194 F. 936 (7th Cir. 1912); *Conners Marine Co.* v. *New York & Long Branch Railroad Co.*, 87 F. Supp. 132 (D. C. N. J. 1950); *The Louise Rugge*, 239 F. 468 (3rd Cir. 1919). These cases are all distinguishable on their facts from the case at bar.

In reversing the trial court, the Circuit Court of Appeals said:

> "The court (below) relies on several cases where it has been said that in the absence of warning to the contrary a ship approaching a bridge may assume the bridge will be open when it arrives. Those cases are completely reconcilable with our conclusion here. Peschken, operating the Lincoln Highway Bridge, did give the warning signal. Perhaps he gave it twice. And no three-blast 'come ahead' was given." (Pb50)

Counsel for petitioner now presents to this court four of the foregoing cases together with three new cases to

show that the opinion of the Court of Appeals is inconsistent with decisions of other circuits.

Petitioner's argument may be divided into two categories. Petitioner cites two cases for the proposition that the Court of Appeals for the Third Circuit, in addition to reversing the District Court, has also overruled two prior opinions of district courts in the Third Circuit (Pb21). The decisions petitioner fears have been overruled are *The Kard, supra* and *Conners Marine Co.* v. *New York & Long Branch Railroad Co., supra.* No reasoning is set forth to show the alleged overruling by the Third Circuit Court. Petitioner's contention is easily exposed. Both *The Kard* and *Conners* involved the total failure of a bridge tender to give a warning signal to an approaching vessel. In *The Kard,* the trial court found that the opening of the drawbridge without more in the way of a signal was an invitation to the vessel to enter. In the *Conners* case, the bridge's liability was predicated upon the "failure to signal and the delay in opening the draw * * *." (At 135.) The basis for these decisions was evident to the Court of Appeals. That court distinguished them as falling within that class of cases in which a ship has approached a bridge *in the absence of a warning.*

The second category of cases cited by counsel are what we may term the "red light" cases. In this category, we list the *Munroe* and *Clement* decisions cited *supra,* together with *The Majestic,* 80 F. 2d 879 (4th Cir. 1936); *City of Chicago* v. *Chicago Transp. Co.,* 222 F. 238 (7th Cir. 1915); and *City of Cleveland* v. *McIver,* 109 F. 2d 69 (6th Cir. 1940). Petitioner predicates his justification for the use of these cases upon his assertions that "The Court of Appeals' decision in this case was based solely on the exchange of whistle signals" (Pb15) and that the holdings in the cases cited indicate in each case the presence of a red light or red ball signal acting as a check upon the approaching vessel. In other words, counsel states, when

the vessel in each of the cited cases approached the bridge in the face of the red light or red ball displayed, it was advancing in the face of a warning not to proceed and, despite the presence of this warning, the bridge was held liable for the ensuing collision. It is inexcusable for petitioner's counsel to imply that the red light or red ball displayed constituted a warning signal *in the face of expressed pronouncements of the courts to the contrary* in those very cases.

The "red light" cases should be examined briefly to demonstrate the inappropriate manner in which they have been presented to this Court.

1. *The Majestic*, 80 F. 2d 879 (4th Cir. 1936). This is a libel *in rem* by the owners of the barge Majestic against the motor tug C-O to recover for damages sustained by the barge as a result of a collision between the barge then in tow of the tug and the drawbridge over the C & D Canal. The bridge is owned and operated by the United States. The rules and regulations governing the navigation of the canal were promulgated by the Secretary of War. In pertinent part they provide for a three-blast signal from the ship notifying the bridge tender of the desire to pass the bridge, which signal must be answered from the bridge by two blasts as a warning that the bridge may not be opened, or by three blasts when the bridge is clear to open. The bridge also showed navigation lights at the center of the vertical lift draw span which were red when the draw span was closed to navigation and green when it was open. When the vessels were about 2,000 feet from the bridge, the master of the tug gave a three-blast signal indicating that he desired to pass through the draw. At that time a red light was showing on the bridge. There was no response to his signal, the bridge did not open, and the red light remained fixed. The bridge tender could not raise the bridge because the mechanism was frozen.

"But he gave no notice of this difficulty until the flotilla was too close to be stopped" (at p. 880). Then he sounded the danger signal of two blasts and called out that he could not raise the draw; but it was too late and the barge drifted ahead of the tug and came into contact with the bridge. The Court indicated that the tug might have stopped when within 1,000 feet of the bridge and so held the barge in check against the tide, "but the master of the tug did not consider that there was any danger because he had received no notice from the bridge to stop * * *" (at p. 880).

The Court below held that the accident was caused solely by the negligence of the bridge tender without negligence on the part of the master of the tug. The Appellate Court affirmed and concurred, citing the rule of *Clement* v. *Metropolitan West Side El. Ry. Co., supra,* in which it was said that if for any reason a bridge cannot be opened, it is the duty of the owner to give proper signals to that effect so as to warn the approaching vessel to heave to. It was argued that the master of the tug was negligent in proceeding in the face of the red light displayed upon the bridge after he had signaled for the opening. The Court answered this assertion by observing that the red light "*did not signify that the draw would not open in due time in response to the opening signal*" (at p. 881). (Emphasis added.) In other words, the red light simply indicated that the bridge was closed to navigation. Were the bridge open, a green light would have been displayed. The lights simply constituted a visual indication of the position of the bridge. They did not constitute a warning signal than any more than a view of the unopened bridge is a warning signal. Moreover, the army engineer's regulations controlled and required a warning signal of two blasts, not any substitute warning signal.

2. *Munroe* v. *City of Chicago*, 194 F. 936 (7th Cir. 1912). The steamer Markham was bound up the Chicago River at about 800 feet from the Taylor Street drawbridge. The cap-

tain of the ship could see two red lights in the center of the bridge. These lights were placed in such a way as to show red when the bridge was closed and green when the bridge was completely open. When the Markham had proceeded 200 or 250 feet after her first signal, her master signaled again for the bridge to open. The bridge was not opened, "nor was any bell rung (indicating to those on the street that the bridge was opening or about to be opened), nor was any other signal given which could have led the master of the vessel to believe that the bridge was to be opened" (at p. 937). By the time the captain realized that the bridge was not going to open and backed the steamer, it was too late and the momentum of the current carried the ship into the bridge. The Court below dismissed the libel pursuant to its conclusion that the accident in the case was due entirely to the fault of the master of the steamer. The Appellate Court reversed, citing the *Clement* case. Specifically, the Appellate Court said that the conclusion of the Court below was inconsistent with the rule of the *Clement* that " 'in the absence of proper warning' the vessel has 'the right to assume that the bridge will be timely opened for passage' " (at p. 938).

Speaking to the effect of the red lights showing on the bridge, the Court observed:

> "The regulations of the lighthouse board referred to (the display of two red lights) are applicable alike to all bridges spanning navigable waters, in thoroughfares of all grades of use, to indicate whether the draw is closed or open, so that the lights are down when the bridge is normally closed, *and are in no sense indicative that the bridge will not open on signal, for the passage of the vessel.*" (Emphasis added, at p. 938.)

Here again the situation is the same as that described in *The Majestic*. The bridge gave no signal in answer to that given by the ship, and the Court explicitly noted that the red lights could not be construed as a warning signal.

3. *Clement* v. *Metropolitan West Side El. Ry. Co.*, 123 F. 271 (7th Cir. 1903). This is a libel *in personam* to recover damages sustained by the steamer F. H. Prince in consequence of her collision with the railway bridge of the appellee which spans the south branch of the Chicago River. The steamer was proceeding slowly toward the bridge when it signaled for the bridge to open. The red lights on the bridge were exhibited. The bridge was unable to open because the locks would not work. When the master of the steamer observed the bridge was not opening, he signaled for his engineer to stop. But before the headway of the steamer could be checked, the collision occurred.

In holding the bridge liable, the appellate court discussed the failure to use any signals to warn off the approaching vessel.

> "* * * when the bridge tender found that the bridge would not open * * * in view of the situation we think it was the duty of the respondent to provide, and of the bridge tenders to give, some sort of warning signal that would timely notify the vessel of the difficulty and of the danger that was imminent, of which she could not otherwise be informed." (at p. 274)

With regard to the existence of the red signal light, the Court said:

> "With respect to the bridge, the signals maintained were *appropriate signals to indicate the location of the bridge*, and possibly the manner in which the signals were designed to be operated was proper and sufficient, under ordinary circumstances, to indicate the open or closed bridge." (Emphasis added, at p. 274.)

In other words, the red light was simply an indication of the position of the bridge and in no way an appropriate signal to indicate that the bridge would or would not open.

4. *City of Cleveland* v. *McIver*, 109 F. 269 (6th Cir. 1940). The steamer Fleetwood attempted to avoid collision with the Center Street Bridge over the Cuyahoga River at Cleveland, Ohio. When it became aware that its signal for the opening of the draw was being ignored, the vessel reversed its engines. As a result, her stern swung to port and collided with the fish tug Babe moored at the city dock. The owner of the tug filed a libel against the steamer and its owners impleaded the City of Cleveland, owner of the bridge. The Court below entered judgment in favor of the libellant against the impleaded respondent. In affirming the decision below, the appellate court noted that the steamer signaled several times for the bridge to open without response. When the steamer had drifted to within 300 feet of the bridge, the bridge tender signaled by waving his hands and calling out that the draw would not open. The steamer's engines were then reversed with the result noted above. The bridge is equipped with a red ball 18 inches in diameter which may be run up and lowered from the bridge operator's cabin. A city ordinance, adopted by the War Department in a bulletin issued in 1936, required that vessels may not attempt to pass a drawbridge unless the red ball is up. The bridge is also equipped with an air whistle to warn approaching vessels if the bridge will not be open in time for safe passage. The ball was not raised nor was the whistle blown. The only signal given was the gestulations of the bridge tender as the vessel approached. With regard to the signal system the Court said, citing *City of Chicago* v. *Chicago Transp. Co.*:

> "Upon the sounding of the bridge signals by the Fleetwood, its master, proceeding at slow speed, had the right to assume that the law would be obeyed and that the draw would open *unless the customary warning signal was given. It is true the red ball was not up, but if it were, it would have conveyed no information to the master of the Fleetwood beyond that furnished by the closed draw.*" (Emphasis added, at p. 72.)

5. *City of Chicago* v. *Chicago Transp. Co.*, 222 F. 238 (7th Cir. 1915). The tug Fitzgerald towing the schooner Skeele was proceeding south with the current in the south branch of the Chicago River. As it approached the Washington Bridge it signaled for the bridge to open. No direct answer to the tug's request was given. Seeing that the bridge was not starting to open, the captain of the tug reversed her engines, the tow lines of the schooner snapped, and the schooner drifted with the current against the closed bridge and was damaged. The bridge was required by city ordinance to lower an elevated red ball or red lantern as a signal to a vessel to approach. In affirming the decree against the bridge, the appellate court indicated that the bridge was liable because of her failure to signal (in this case a physical movement of the ball or lantern). With regard, however, to the simple existence of the ball or lantern, the Court said:

> "The red ball or lantern, however, normally elevated in advance of any inquiry, gives no answer to a present question, *conveys no information beyond that furnished by the closed bridge itself by day, and by the lights required by government regulations at night.*" (Emphasis added, at p. 241.)

In each of the above cited cases, the pattern is identical. In all seven cases no properly responsive signal of warning was employed in answer to the signal from the ship requesting permission to proceed. In five of the seven cases cited, the so-called "red light" cases, the use of marker signals to indicate the position of the bridge was considered by each Court in turn as inappropriate to indicate any warning to the approaching vessel.

Despite the attempted distortions by counsel for the petitioner as to the import of the red lights, in not one of the cases cited was the ship warned off in time. In several of these cases there are further indicia of facts which, *in the*

absence of such a warning signal, could be taken to constitute an invitation to the ship to proceed. The prudence of the acts of the masters of those vessels, however, should not become a part of this discussion.

Circle Line Sightseeing Yachts v. *City of New York*, 283 F. 2d 811 (C. C. A. 2, 1960) is also introduced by counsel to show the import of signal exchanges. This case reveals a unusual signalling situation. The vessel involved could pass under the bridge only when it was closed. When the bridge was open, projections extending therefrom barred passage by the vessel. The *Circle Line* case must clearly be restricted to its peculiar facts. The simple facts in the case at bar as found by the District Court and as affirmed by the Court of Appeals, show that in response to the approach signal sounded by the Lembulus, *the bridge responded with the authorized warning signal.* Regardless of other "stimuli", the vessel did not heed this signal but continued its approach without waiting for the "come ahead" signal of three blasts required by the federal regulations. The case at bar represents a flagrant disobedience of controlling regulations. The decision of the Court of Appeals below is consistent with the general law on the subject.

B. The cases relating to the applicability of the rule of *The Pennsylvania*, 86 U. S. 125 (1873) are consistent with the opinion below.

Counsel for petitioner has represented that the bridge was defective and therefore in violation of the statutory command of 33 C.F.R. 203.200(d) that the draws "shall be opened promptly". He argues that since the bridge was defective it could not be opened promptly and that therefore "the act of operating a defective bridge is wrongful" (Pb22). The argument continues that this operation of a defective bridge constitutes a breach of statutory obligations by the bridge operator to which the rule of *The Penn*

sylvania (which assigns the burden of proof to that party in violation of a statutory duty) should be applied.

One basic error is that the defect in the bridge is not chargeable to respondent, Peschken. He is not the owner of the bridge. Nor was he responsible for its repair.

To bolster the argument, petitioner's counsel cites several cases relating to the applicability of the *Pennsylvania* rule in situations involving a violation of statutory duty. One of these cases, *Merritt-Chapman & Scott Corp.* v. *Cornell Steamship Co.*, 265 F. 2d 537 (C. A. 2, 1959), discloses a failure on the part of the bridge to set sufficient lights in breach of a statutory requirement therefor. The second case cited by counsel, *Fort Fetterman* v. *South Carolina State Highway Department*, 261 F. 2d 563 (C. A. 4, 1958) deals with a collision involving a bridge constructed in a manner materially at variance with plans and specifications issued by the War Department. In both of these cases the rule of *The Pennsylvania* was invoked (despite other facets of negligent conduct which appeared) to shift the burden of proof to the bridge for violation of statutory duty.

Counsel's accusations of statutory violation which may require the application of the rule of *The Pennsylvania* are ill-founded. On page 22 of his brief, counsel declares that:

> "The opening sentence of 33 C.F.R. 203.200(d) commands that the draws 'shall be opened promptly' and a similar command appears in paragraph (e) where it is required that the draws shall be opened 'at once'."

Ignoring the fact that counsel's reading has not been accurate and that section (d) of the cited regulation does not say what he claims (his undoubted reference was to section (a)), the language of section (d) may not be divorced from the rest of the regulation. This section provides for a specific signal to be given "in case of delay in opening the draw * * * or as may be necessary by accident to the ma-

chinery or other contingency". Since the regulation has wisely provided for a warning system in the event for some reason the draw cannot be opened promptly, and since the bridge tender, upon perceiving that such prompt opening might not be accomplished, sounded the prescribed signal, it is very difficult to understand how this explicit compliance with the appropriate regulation can be considered at the same time a violation of its terms. It is possible that by his citation of the *Fort Fetterman* case counsel has attempted to imply that the bridge in the case at bar was defective because it did not conform to federally authorized plans and specifications for its construction. This, of course, has never been in issue in this case. No proofs were offered or taken on this point.

If the rule of *The Pennsylvania* is, however, to be invoked, regard must be had to the language of the Court of Appeals in reversing the District Court. Referring to the failure on the part of the vessel to obey the signal from the bridge, the Court said:

> "If her (the vessel's) failure to obey the signal contributed to the collision, she cannot recover under the rule of *The Pennsylvania*, 86 U. S. 125 (1873). But we do not need the authority of *The Pennsylvania* to decide this case against the libellant. The disobedience of the rule was the substantial cause of the collision." (Pb50)

Petitioner's invocation of *The Pennsylvania* rule does not advance petitioner's cause; this very rule bars petitioner from recovery, as found by the Court of Appeals.

POINT III

The opinion of the Circuit Court creates no new rule of law that requires review by this Court; the contentions of petitioner, however, would create uncertainty and an unjust result in the case at bar.

In its opinion, the Court of Appeals gave recognition to the necessity for the rigorous enforcement of regulations pertaining to navigation. In so doing, the Court manifested its appreciation of the dangers presented in those situations which the regulations are intended to control. This recognition was a motivating force behind the rejection of the novel invitation theory espoused by the trial court. It may be argued that in a case in which no warning signal is received by a vessel, it is necessary to allow a reasonable assumption of an invitation to proceed, solely in order to fix the respective duties and responsibilities of the parties in case of mishap. This necessity, however, does not remove the confusion which must exist in the minds of the parties immediately before the collision occurs. It is imperative, therefore, that the opinion of the Court of Appeals be left undisturbed and that the invitation theory not be extended in such a manner that will add to the confusion and the concomitant dangers to navigation. To extend the invitation theory *in the face of a warning signal* would be to force upon the bridge tender as to confusion what his next move should be. This problem was recognized by the Secretary of the Army in the promulgation of 33 C.F.R. 203.200 (d), when he wisely provided for a "come ahead" signal when the bridge was ready to receive the vessel. This form of invitation is clear. An unprescribed invitation created by other action would be confusing.

It is important for an additional reason to accept the findings of the Court of Appeals. Even if it should be deemed necessary to consider the application of the invita-

tion theory to a situation in which a vessel proceeded in the face of an explicit warning, such a possible application should not be explored in the context of the fact situation here presented. For this case deals not merely with simple negligent disobedience on the part of the approaching ship; it deals with negligent disobedience *arising from a statutory violation.* In fact, the Court of Appeals has indicated that although it was sufficient to decide this case on the disobedience of the rule of navigation, "if the ship's failure to obey the signal contributed to the collision, she cannot recover under the rule of *The Pennsylvania*, 86 U. S. 125 (1873)" (Pb50). Thus the need to sustain the decision below applies to the specific facts of the case at bar and applies, as well, as a guide to future conduct and as a reaffirmation of existing principles of navigation law.

POINT IV

The result reached below can be sustained on the point of fact that the vessel's excessive speed caused the collision, and on other grounds; therefore, the points raised by petitioner as a basis for *certiorari* would not alter the result on an appeal to this Court.

The determination of the Court of Appeals can be sustained on any of the following grounds:

1. The vessel was travelling at an excessive speed.

2. The draw span did not stop during its ascent.

3. Petitioner's master, Capt. Hawkins was discredited as a witness; the vessel's records were in conflict and contradiction; an inked notation made by Captain Hawkins in the Bridge Movement Book (not kept by the Captain, and otherwise entirely recorded in pencil simultaneously with events observed on the bridge) conflicted with page 9 of the Deck Log; page 67 of the Deck Log which contained

a full report of the accident is the only page in the log which is out of order: it *follows* "page 68," and "page 68" *precedes* page "67"; the story on page "67" conflicts with the captain's testimony at the trial where he said several times that the vessel was at the Pulaski Skyway when it signaled for the bridge to open; page 9 of the Deck Log shows that the vessel cleared the Lackawanna Bridge at 1546, but in his inked notation in the Bridge Movement Book the Captain seeks to designate the bridge cleared at 1546 as the City Bridge.

As for the speed of the vessel, Captain Hawkins fixed its position at the Pulaski Skyway at 1553½. The collision occurred 3½ minutes later. The distance covered in this time was less than .6 nautical miles. The speed of the vessel by Captain Hawkins' own admission was 9 to 10 knots (R24a). This is almost the maximum speed of the vessel in the open ocean (R24a). Also admitted was the fact that 3.42 knots was a sufficient speed at the time to maintain steerageway of the vessel (R22a).

When the speed of a vessel impairs its ability to meet unexpected dangers, particularly those arising in crowded or confined waters, the vessel is held responsible for the accident. In most such cases, speeds of six knots or more are considered excessive. See: *The Favorita*, 85 U. S. 598, 603 (1873); *The Acilia*, 120 F. 455, 458 (4th Cir. 1903); *The Corsica*, 76 U. S. 630, 634 (1869); *The George H. Jones*, 27 F. 2d 665, 667 (2nd Cir. 1928).

In the last case cited, the late Judge Learned Hand said:

> "Speed is clearly relative to the situation of the ship; what is proper at sea is ordinarily improper in a harbor, and one harbor speed should differ from another. The Jones was moving into crowded waters; besides the Sunoco and the tow, there were several small tugs thereabouts, and she was to pass within 400 or 500 feet

> of a ferry slip from which at any time a ferry might emerge, and into which another was bound. *At such a place and at such a time she was bound to hold herself in reserve against possible miscarriages on the part of any of these vessels.*
>
> Not much can be deduced from the fact that she had so much difficulty in checking her way after passing the Sunoco. She had put on what steam she had when she hard astarboarded to escape that vessel, and in that we cannot charge her with fault. We believe, however, that the rate at which she was approaching upset the Sunoco's composure and made her miscalculate the Jones' course and her purpose. For that she was at fault, quite as though it had been the direct cause of the collision. Amid such a tangle of shipping and in such a narrow berth, she should have foreseen that the only safe course was to move at a very moderate speed." (Emphasis added.)

The proof that the bridge span did not stop rising is, in outline, the following:

(a) Only Captain Hawkins said the bridge stopped.

(b) P-4, the Bridge Movement Book does not say the bridge stopped; this book records events as they occur; it simply says at 1556, "Full astern, bridge not opening fast enough." This says that the bridge was still opening, though not fast enough for the speed of the vessel.

(c) Page 9 of the Deck Log does not state that the bridge stopped.

(d) Captain Hagen, a pilot aboard the Lembulus said: "it's a slow bridge, but as far as I can recall, she went up but slowly" but he denied that he ever saw the bridge stop (R35a).

(e) The Accident Report of the bridge tender made out on December 20, 1957, states that "2 long blasts" were given by the bridge "due to electrical trouble" but that the vessel did not slow up until after the collision and that the "span continued to go up slowly" all the while.

(f) In the "few moments" (Pb85) after the impact with the foremast, the bridge moved a full 9 feet before the mainmast struck. This is calculated from the captain's testimony, the draft of the vessel and the height of the collision points of the masts. See: Pb85. This calculation has not been denied by petitioner.

(g) Although "the second officer, the chief officer, the pilot, the man at the wheel" and Captain Hawkins were in the wheelhouse on December 20, 1957, from 1543½ to 1557, Captain Hawkins could not recall "who else saw it (the bridge stop) at the time" (R12a).

(h) Statements were taken from the crew by the owner's legal representatives but no other crew members were produced as witnesses.

(i) Hines, Bents, Peschken and Hagen all testified that the bridge did not stop.

(j) Waxin, petitioner's only witness besides Captain Hawkins, said he did not know "whether the bridge stopped at all" (R29a).

Thus, a full understanding of the particular facts of this case compels the denial of recovery to the vessel. Although the District Court judge reached a contrary conclusion we submit that such conclusion was completely unjustified on the facts and the law. The trial judge invented a concept of invitation to proceed in the face of a warning signal not found in any other case, and unanimously rejected by the Court of Appeals. The trial court's opinion, moreover,

contains numerous errors of factual statement and factual conclusions. For example, at Pb29 the District Court's opinion recites the entry on page 9 of the Deck Log, including the vessel's passage of *the Lackawanna Bridge at 1546*. The trial court adds that, "These entries are confirmed by similar entries in the bridge movement book and in the engine movement book of the vessel." Later, in its opinion, the lower court said (Pb42), " It is *uncontradicted* that the vessel passed the *city bridge* at 1546 hours * * *." (Emphasis added.) The choice of the bridge passed at 1546 affected the court's findings of the vessel's speed between 1546 and 1557. If the vessel passed the Lackawanna Bridge at 1546, it traveled a longer distance to the Lincoln Highway Bridge between 1546 and 1557.

The trial court also noted the conflict in testimony respecting the turning of the vessel. Only Captain Hawkins testified that the vessel went stern-first through the Lackawanna Bridge and was turned between the Lackawanna Bridge and the City Bridge. Petitioner's other witness, tugboat Captain Waxin, could not recall what happened. All other witnesses, including operators of the Lackawanna Bridge, said the vessel went through that bridge *bow-first*, after first being turned in the river. But in its first opinion the trial court failed to resolve this conflict. The trial court failed to make any findings on the incredibility of Captain Hawkins' testimony as it bore on the speed of the vessel and on petitioner's overall case. But on the motion to set aside the judgment notwithstanding the trial court's findings, the trial court was finally persuaded and said:

> "I am satisfied she turned above, north of the Lackawanna bridge." (R82a)

This is the final refutation of the testimony of Captain Hawkins and of petitioner's case. The whole time schedule of the vessel's passage downstream was built around the falsehood that the vessel went *bow-first* through the Lacka-

wanna Bridge and was then turned in the river *south* of that bridge.

The trial court also referred vaguely to the rules of the New Jersey Highway Department as though they had a bearing on the case (Pb28). But the court in its letter opinion after the motion, after the contention was made that only the federal regulations governed, said the vessel was "entitled to rely" on the regulations of the Secretary of the Army" (Pb45), since there was "no evidence that the master of the vessel or her pilot had knowledge * * * of the regulations adopted by the Highway Department with regard to the giving of warning signals * * *." As for the trial court's reliance on the theory that Peschken should have used alternate controls, this was never argued by petitioner, it was abandoned by the trial court as a ground for supporting the judgment (in its letter opinion following the motion), there are no facts to support the conclusion that the alternate controls would have moved the bridge faster after the alleged stoppage and it was never an issue litigated by the parties. There is simply no engineering data or expert evidence to indicate that Peschken was negligent for not using alternate controls, when the evidence clearly shows that the span moved 9 feet in the "few moments later" (Pb85) after the foremast struck the bridge.

Much more can be said. But as the Court of Appeals remarked the question to be decided is much simpler than the briefs would indicate (Pb48). The Court of Appeals properly decided that question. But it could have denied recovery to the vessel without ever reaching the question of the exchange of signals and the right to proceed. For the evidence overwhelmingly shows that the vessel was going too fast even if it had the right to proceed and that its early arrival at the bridge before the bridge could fully open caused the accident.

Moreover, the complete unreliability of petitioner's case justifies a denial of recovery. Alterations in log books, the contradiction between log books and witnesses and among log book entries, tampering with the records and the failure to produce testimony of crew members on a material issue are facts that cast "suspicion" on petitioner's case and are strongly "condemned in courts of admiralty." See: *The Silver Palm*, 94 F. 2d 754, 762 (9th Cir. 1937); *The New York*, 175 U. S. 187 (1899).

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari to the United States Court of Appeals for the Third Circuit should be denied.

Respectfully submitted,

DAVID D. FURMAN,
Attorney General of
New Jersey,
Attorney for Respondent.

THEODORE I. BOTTER,
Assistant Attorney General
and
ELIAS ABELSON,
Deputy Attorney General,
Of Counsel.

[APPENDICES FOLLOW]

Appendix A

Excerpts from Testimony

Newark, New Jersey
May 2, 1960

Before:

HONORABLE REYNIER J. WORTENDYKE, JR., U. S. D. J.

Appearances:

MESSRS. MCCARTER & ENGLISH,
By: FRANCIS E. P. MCCARTER, ESQ. and
ROBERT M. JULIAS, ESQ.,
Proctors for Libellant.

DAVID D. FURMAN, ESQ.,
Attorney General of New Jersey
By: ALFRED P. D'AURIA, ESQ.,
Proctors for Respondents.

* * *

WILLIAM AIRD HAWKINS, called by the libellant, having been first duly sworn, testified as follows:

Direct examination by Mr. McCarter:

* * *

Q. On December 20th, 1957, at about three o'clock in (4) the afternoon, would you state where the Lembulus was? A. The Lembulus was laying at Copper Coke, Hackensack River.

Q. What was its position? A. She was moored portside to the wharf, heading north.

Appendix A

Q. Now, Captain, before we go any further with the Lembulus, from that point on, I show you an U. S. Coast and Geodetic Chart of the Passaic and Hacksensack River, which has heretofore been marked as plaintiff's exhibit for identification as Plaintiff's Exhibit 1 and ask you whether or not you can identify this chart as depicting the area in which your vessel was moored on that date. A. Yes.

Mr. McCarter: I ask that this chart be marked in evidence.

The Court: Any objection, Mr. D'Auria?

Mr. D'Auria: Yes. I did object.

The Court: On what grounds?

Mr. D'Auria: Sir?

The Court: On what grounds?

Mr. D'Auria: I don't know if that is an official map of the area.

The Court: It is United States Coast and Geodetic Survey.

Mr. D'Auria: I still don't know, your Honor.

The Court: I'll take judicial notice of it.

* * *

Q. When on the high seas, whose duty is it to make entries in the Log Book? A. The entries are then made by the Officer on watch.

Q. Is there any regulation which requires that these entries be made during the time the vessel is in port, as you testified?

* * *

A. Yes. These are done in the normal course of running the vessel.

Q. And how often are the entries made in the normal course of the business of the vessel? A. At the end of each day.

* * *

Appendix A

Q. All right, Captain, will you testify what is the purpose of your signature which we find is on that page and on numerous other pages of the book? A. My signature indicates that I have read and agreed with the entries which have been made.

* * *

Q. Captain, we now have you at Copper's Wharf about three p.m. on the date in question, December 20th, 1957. Will you state, Captain, since you have already told us you were outward bound, what your destination was? A. From that point, the vessel was bound for Curacao.

Q. In the West Indies? A. In the Dutch West Indies.

Q. What time of day did you, in fact, start your movement into the channel from position A on Exhibit P-2? A. The vessel started moving at 1529 hours on the 20th of December, 1957.

Q. Did you have a pilot on board at that time? A. Yes.

Q. Who was he? A. Captain Bassett.

Q. Of what company? A. The Moran Towing Company.

Q. Where is he now? (22) A. I don't know.

The Court: What was his name?

The Witness: Captain Bassett.

The Court: Of Moran?

The Witness: Yes.

Mr. McCarter: I think we can stipulate, Mr. D'Auria, that Captain Bassett is dead.

Mr. D'Auria: Yes.

Mr. McCarter: To take care of his location, unfortunately.

Q. Were there any tugs accompanying you from that point on? A. Yes.

Q. How many? A. Two.

Q. And from what company? A. Moran Towing Company.

Appendix A

Q. Will you describe the first movements of the vessel? Until it got into channel, pointing seaward. A. With the assistance of tugboats, the vessel stern was pulled off the wharf. She was then straightened out to pass stern first through the Lawekawanna Bridge, and on getting into a favorable position seaward of this bridge, she was turned with the assistance of tugs and headed seaward.

Q. Will you please put on this chart, in the same manner (23) you did before, the approximate location of the Lembulus when it was first turned seaward.

(Witness marks.)

Will you label that with the letter B, and it might assist the Court if you were to put next to that the approximate time when this position was reached. A. 1540 hours on the 20th of December, 1957.

* * *

The Court: So you want to account for the speed all the way down.

Mr. McCarter: I do, sir.

Q. Now, Captain, can you testify what the bridge movement orders were between points B and C? A. At 1540, the vessel was turned seaward and lying dead in the water, more or less. At 1542, the vessel was put to slow ahead, and after passing under City Bridge at 1546, dead slow ahead. After passing under City Bridge at 1546, the engine was put on dead slow ahead. At 1546, at half slow ahead. She was, by that time, about the bridge.

Q. What then was the approximate time that the vessel was at position C, bearing in mind that this is not to scale? A. 1546-½.

Q. Will you please insert that on the chart.

Appendix A

(Witness writes.)

Now, Captain, what was the next bridge movement order to the engine room after that point?

A. At 1547, half ahead. At 1547-1/2, full ahead.

Q. By full ahead, will you state what is meant by that. A. Full ahead harbor speed.

Q. What would the approximate speed of the vessel be under the conditions which then existed at harbor full ahead? A. The maximum speed of nine knots.

• • •

Q. Captain, what would you say would be the speed of half ahead under the conditions that existed at that time, and by the way, I am going to ask you what those conditions (27) were in just a moment. A. About seven knots.

• • •

Q. How long did you continue at harbor full ahead, Captain? A. Until 1553-1/2, when the engine was moved to slow ahead at dead slow ahead in the one movement.

Q. Now the next bridge I notice is called the Pulaski Skyway. That is not a drawbridge, is it? A. No.

Q. That you can go under without any movement of the bridge. I think that is conceded.

Q. Now, the bridge after that is the Lincoln Highway bridge. That, however, is a drawbridge, is it not? A. Yes.

Q. Did you make any signals to that bridge, warning them of your approach? A. Yes.

(28) Q. At about what time did you make that signal, do you recall? A. At about 1553, approximately.

Q. Where were you in relation to the Pulaski Skyway when that signal was made? Were you north of it or south of it, or where? A. Just about to pass under it, slightly.

Appendix A

Q. What signal did you make to the bridge? A. Three blasts.

Q. Can you state what the bridge did thereafter? A. The bridge answered our signal and commenced lifting almost immediately.

* * *

Q. Captain, during the time, all this time that you have testified to, during the time that the vessel was passing down the river, where were you located on the vessel? A. On the bridge.

Q. And you testified that a pilot was aboard. Will you tell us whether or not that pilot was in charge of the vessel at that time, or whether you were in charge of it? A. I was in command.

Q. If the pilot had given an order with which you disagreed, did you have authority to countermand that order? A. Yes.

Q. At the time the orders were given to the helmsman, who, in fact, gave those orders during this period? A. The pilot.

Q. And were you present when he gave all those orders? (30) A. Yes.

* * *

Q. How far to the north of the draw was the bow of the vessel when she blew for the draw, when she signalled for the draw? A. Just north of the Pulaski Skyway.

The Court: All right. Go ahead.

(34) Q. Well, now for schematic purposes only, Captain, will you put on the chart the very approximate location of the vessel at the time the speed was reduced from harbor full ahead that you have already testified? A. 1553-½ slow

ahead and dead slow. The vessel would be approximately at this position here, just north of the Pulaski Skyway.

Q. Label that, if you will, please.

I take it that is the time you have already testified to, approximately the time that the signal was made to the bridge? A. Yes.

Q. Well, now, would you give the speed orders made to the engine room between the time the speed was reduced from harbor full ahead to the time that she finally arrived at the Lincoln Highway bridge. A. At 1554, the engine was stopped. At 1555, dead slow ahead and stop; 1556, full astern, and at 1557, the top mast, the forward top mast hit the Lincoln Highway bridge.

Q. Now, you have taken these times by reference to the bridge movement book, have you not, sir? A. Yes.

Q. Have you compared the entries in the bridge movement book with comparable entries of the engine movement book for that day? (35) A. Yes.

Q. Have you found any discrepancies in time? A. Yes.

* * *

Q. Approximately how far north of the Lincoln Highway bridge were you when you observed that you could not clear it? A. A. About a ship's length away.

Q. By that, do I understand that the bow of your vessel was approximately a ship's length away from the near edge of the lift? A. Yes.

* * *

Q. Will you state to the Court what in your experience is the ability of a person standing on the bridge of a vessel to judge whether or not you were going to clear a bridge as you approach it? A. It is almost impossible until you are in a position where you can't do very much about it.

Appendix A

It is almost impossible to tell whether you will clear a bridge when you are passing under it until you are in an impossible position to do anything about it.

* * *

Q. And how long approximately would it take under the conditions that existed to bring the vessel to a halt by the use of full speed astern? A. About five minutes.

Q. Will you testify whether or not the use of full speed astern—I withdraw that question—will you testify now as to just how long under the conditions then existing you could safely have used full speed astern? A. Not more than a minute.

Q. What would have happened under the conditions then existing had you used it for longer than that? A. The vessel would have canted to starboard. The bow would have hit the pier on one side, and, as she continued to make headway through the pier, the stern would have gone over to the port and the rudder and propeller would be in (44) danger of striking the pier on the other side.

Q. Captain, you already testified that you were under ballast at this time. Can you tell the Court how high above the water line the top, which I believe you call the truck of the foremast, was as you went down the Hackensack River on that day?

The Court: It was the foretop, wasn't it?

The Witness: The foretop.

The Witness: Approximately one hundred and twelve feet, six inches.

Q. And how high was the truck of the fore main mast—the truck of the main mast? A. The truck of the main mast was approximately 112 feet.

Q. And how high above—well, I'll withdraw that—

which of those two masts is the higher mast above the deck? A. The main mast.

Q. How do you account for the fact that the foremast was six inches higher at that time above the water line than the main mast? A. On account of the trim of the ship at that time when she was in ballast.

Q. In other words, the stern was lower in the water than the bow? A. Yes.

* * *

Q. What point on the foretop mast struck the bridge, Captain? A. The foretop mast struck the bridge approximately nine feet below the truck.

Q. And what point, if any, on the mainmast, struck the bridge? (46) A. The main top mast struck the bridge approximately four inches, four to six inches below the truck.

* * *

Q. Now, you have testified, Captain, that you struck—the foretop mast, at least, struck the bridge at, I believe it was, 1557 or thereabouts; and that the bridge was at a stationary position at that time. Did it, in fact, ever again start to rise? A. Almost immediately after the foretop mast had hit the bridge, we noticed that the bridge started rising again.

Q. Did it continue to rise for any time? A. It continued to rise until the ship had passed underneath it.

* * *

Cross examination by Mr. D'Auria:

* * *

Q. On this deck log book, this story was written by the Chief Officer, is that it, sir? A. Yes.

(68) Q. Not the Chief Engineer, but the Chief Officer? A. The Chief Officer, yes.

Q. That is page 67, the list of casualties, right? A. Yes.

Q. I am confused then. That story was written after you had a conference with the Chief Officer, is that right, sir? A. Yes.

Q. Now the other entries made by the Chief Officer in this book, does it state that the bridge stopped in any other part of this book with the exception of page 67? A. No.

Q. It does not, only on page 67, is that correct, sir? A. Yes.

Q. And am I correct in stating that you had a conference with your Chief Officer before the entry was made? A. Yes.

Q. And based on the conference that you had with the Chief Officer, he received the information that the bridge stopped from you, isn't that correct? A. Yes, and also—no—I withdraw that.

Q. Now this story which is written is made up after the conference with you and the examination of the engine movement book, the bridge movement book, and what was the other book, the engine—

(69) The Court: The engine movement book.

Q. The engine movement book. Now, nowhere in the engine log book, the bridge movement book, or in any other part of the deck log book, is it ever mentioned that the bridge stopped? A. No.

Q. Now, after the story is made up and put in on page 67, there is a copy of it prepared, isn't that right? A. No, the copy is made by carbon paper at the same time that the entry is made.

Q. Yes, sir, and then that carbon copy is sent to the home office? A. It is sent to the office, yes.

* * *

Appendix A

Q. This November and December trip was your first trip (85) of the vessel known as the Lembulus, is that right, Captain? A. Yes.

Q. And December 20th was the first time you ever entered the Hackensack River to go to Copper's by vessel, is that right? A. No. The ship came into the river and the ship left the Hackensack River.

Q. I meant before December 20th, you went up the Hackensack River, is that right, sir? A. Yes.

Q. That was your first time? A. Yes.

The Court: But that voyage was your first visit to the Hackensack River?

The Witness: Yes.

The Court: With that vessel?

The Witness: Yes.

* * *

Q. Would you tell me who was in the wheelhouse on December 20th, at 1543½? A. There was the man at the wheel, the pilot, the second officer, and myself.

* * *

Q. On December 20th, 1957, for 1543½ to 1557. A. The second officer, the chief officer, the pilot, the man at the wheel, and myself.

* * *

Q. Now, when you struck the bridge, where were you and the pilot? A. We were outside on one side of the bridge.

Q. And before you struck the bridge, you instructed someone to leave that wheelhouse and go and warn the crew? A. Yes.

Q. What was that? A. The Chief Officer.

Q. He left the wheelhouse to warn the members that were on deck that you were going to strike? A. Yes.

(92) Q. To get out of the way? A. Yes.

Q. Did you actually see him do it? A. Yes.

Q. Do you know, of your own knowledge, as to, besides yourself, who actually saw the bridge stop? A. I can't recall who else saw it at that time.

Q. You cannot recall. Are there statements made orally or in writing by any other members of the crew with the exception of yourself and the pilot?

The Court: What statements?

Mr. D'Auria: Statements to the occurrence of the bridge stopping.

Mr. McCarter: Where?

The Court: Do you mean by statements, any statements by anyone else? If he knows of it, let him mention it.

A. At Bethlehem Steel, while the ship was in the Bethlehem Steel yard, the owners' legal representatives came down and took statements from various members of the crew.

Q. Where are those statements today? A. I don't know.

Q. You don't know? A. No. I presume that the owner has most of them.

* * *

Q. You stated that, when you got away from the wharf, and before the tugs moved your ship from the stern to the bow, you had backed through the Lackawanna Bridge, is that right? A. Yes.

Q. How long did you say that these movements took?

The Court: There is a question pending, Mr. Witness. Can you answer it?

A. From the time, from about 1529, and the turning, the movement was completed at 1540.

Q. At 1540, where was the position of your ship? A. Approximately here (indicating) at position B.

* * *

Q. You are certain, sir, that you did not go through the Lackawanna Bridge with the bow—

The Court: Bow first, you mean?

Mr. D'Auria: Bow first.

A. Yes.

Q. You are positive of that? A. Yes.

Q. Now, reading from the extract of the ship's log book, "3:29 PM, left Kearny Point, New York, in ballast, and proceeding down river bound for Curacao, pilot on board and tugs Catherine Moran and Pauline Moran in attendance. 3:46 PM, dead slow ahead, vessel cleared Lackawanna." Which is correct? You have a distance from the bridge where your vessel turned around at 1540. This is an extract from the ship's log book. Do you want the ship's log book to look at? A. Yes, please.

The Court: Apparently, he has the log book. What is your next question?

Mr. D'Auria: I have asked him which is correct. He has 1540 beyond the Lackawanna Bridge, making a turn, when the log book states, "3:46 PM, dead slow ahead, vessel cleared Lackawanna Bridge"; dead slow ahead. What (96) does that mean to you?

The Witness: Dead slow ahead.

Q. What does ahead mean; that you are using the stern or the bow? A. You are going ahead.

Q. Ahead, meaning which way? Which part of the ship

was going ahead? Doesn't that mean that the bow—that you had already been turned before you cleared the Lackawanna Bridge at 3:46, such as it states in that book? A. No. The ship was taken off the wharf, stern-first, and turned below the Lackawanna Bridge.

Q. You still say then that this does not mean that you went through the Lackawanna Bridge with the bow dead slow ahead? A. Yes. The ship was turned off this pier with the stern, and you are almost up against this bridge in that position, very close to it. The ship was towed through here.

Q. Stern first? A. Stern first, turned and headed down-river.

Q. But your books do not say that. It says, "Dead slow ahead at 3:46 PM, vessel cleared Lackawanna Bridge." That is what it says. A. Yes, this book here.

Q. Does anything in your bridge movement book and (97) your engine movement book tell you which part of the ship went through the Lackawanna Bridge? A. No, but I know that, at 3:46, the vessel was in fact under the City Bridge.

Q. That "City Bridge" was written when? A. When was it?

Q. When was it written? A. That was written in by me when I asked the pilot what the name of that particular bridge was.

Q. When was that, on December 20th? A. Yes.

Q. At what time, what time of day? A. I don't recall the time, but it was written that day, when I checked with the pilot what the name of that bridge was.

Judge, you see, our charts are very small.

Q. In the bridge movement book, sir, at 1540, your Second Officer put there what? A. Vessel turned in channel at 1540.

Q. Does he state where he turned in the channel? A. Pardon?

Q. Did he state there where he turned in the channel? A. No.

Q. Then is that statement in the bridge movement book (98) and the statement in this book which is written after and at the end of the day, and a copy of these books here, as was testified to before, the correct statement, or these books, that at 3:46 dead slow ahead, vessel cleared Lackawanna Bridge? A. Yes. Well, I think I can explain this Lackawanna Bridge. The first bridge, which is noted in the movement book as the vessel passing, is here at 42½, slow ahead, approaching bridge. Now, this bridge here, which I noted as City Bridge, was this set of bridges here. The Chief Officer makes up this book at the end of the day. He noted from this record—I'm assuming that this is how this mistake was made—that he noted from this record that the ship passed the bridge; from our very small scale chart covering this area, he took the first bridge over the river as this bridge here.

The Court: Indicating the Lackawanna.

The Witness: Indicating the Lackawanna Bridge by mistake, whereas it was, in effect, this bridge here.

The Court: Indicating what you referred to as the City Bridge.

The Witness: Yes.

The Court: All right.

Q. Why was not that book made at the end of the day (99) corrected to state that it was the City Bridge there and this book or ship log book, the engine book, and this report that was made? You testified on direct you read those reports and you signed them, and that they were all accurate. A. Well, I didn't check the actual name of this bridge. I didn't check it from the chart myself. I assumed that my Chief Officer had picked it up correctly.

Q. Now, sir, which one of these were put in the books first? City Bridge or was it put in the bridge movement book or was it put in that book?

The Court: By "that book," you mean the deck log?

The Witness: The movement book is filled up at the instant that these engine movements are made.

Q. This deck log? A. Is copied from.

Q. From the bridge movement log? A. This deck log is made up at the end of the day from the information gleaned from this. This is not necessarily a complete copy of this.

The Court: So we get all these "this's" straightened around, and an appeals court can know what we are talking about, what you have referred to here as the deck log is made up at the end of the day from information obtained from the bridge movement book, which is entered therein (100) immediately upon the happenings in question, is that right?

The Witness: Yes, that is true.

Q. Now, sir, when this deck log book was made up—and who was it—the Chief? A. The Chief Officer.

Q. And the Chief Officer looked at this book, why did he put "City Bridge," instead of Lackawanna in that book?

Mr. McCarter: If he knows.

Mr. D'Auria: Stop interfering. Sit down.

A. I don't know.

Q. You don't know. Did you write City Bridge in this bridge movement book before this was made up? A. Yes, because I recall getting this information from the pilot.

Q. Why didn't he then—the man who made this book up—enter in there as "City Bridge"? Instead of Lackawanna? I'll ask you again.

Mr. McCarter: I don't think the Captain is competent to testify the reason for somebody else doing something.

The Court: I agree with you. I will sustain the objection. I often wonder why some other people do some things. You examined this report, sir, and you signed it as being an accurate report, is that right?

(101) The Witness: I signed it, believing it to be correct.

Q. Now you find it is not correct, is that right, sir? A. Yes.

* * *

Q. And when you read those, you made no corrections, is that right? A. That is correct.

Q. Now, sir, you put yourself at 1540 beyond the Whitpen Bridge or the Lackawanna Bridge, in between the Lackawana and or the next three bridges that we referred to as the Pennsylvania bridges, is that right? A. Yes.

Q. In the bridge movement book, at 3:41, you are stopped, according to this.

Mr. McCarter: Of course, I object to that statement because it is entirely incorrect. It doesn't say the vessel is stopped. This is a list of commands to the engine room.

The Witness: Stopped, yes, that is correct.

The Court: He says it is correct.

Q. What does it mean, sir? A. It means that the engine has stopped.

Q. But the vessel is still moving? A. The vessel is probably still moving, yes.

* * *

Q. At 1543½, slow ahead, bridge open, is that right? A. yes.

Appendix A

Q. At 46, 3:15, 46, you passed under the bridge. A. Yes.

Q. What bridge did you pass under? A. This bridge, these bridges.

The Court: City or Whitpen Bridge.

The Witness: These three bridges, sir.

Q. And at 46½, slow ahead? A. Yes.

Q. Is that right? A. Yes.

Q. So it took about three minutes to go through those three bridges? A. Yes.

Q. At 1547, you gave the—or the pilot gave the engine room word to go half ahead? A. Yes.

• • •

Q. At 47½, if I recall this morning, you said the speed —that that is about seven knots. A. Yes.

Q. Half ahead, if I recall this morning, you said that was approximately seven knots. A. Yes.

Q. And at 47½ full ahead is approximately at harbor speed, which was nine knots. A. Nine knots, yes.

Q. So from the time you left the last bridge you gave the orders full ahead at nine knots? A. Yes.

Q. Do you know the distance between the last railroad (106) bridge to the Skyway?

The Court: The Pulaski Skyway.

Q. If you don't, I'm going to ask you to be guided by the official geodetic map with a pair of dividers to give you the distance.

Mr. McCarter: Here is the one. It is in evidence.

(Witness works with map and dividers.)

A. .57 miles.

Q. .57 miles?

• • •

Appendix A

Q. Now, sir, what is your speed in the ocean, the cruising speed of this vessel? A. Ten and three-quarters, eleven knots.

Q. Sir, what is the slowest speed at which a vessel the size of the Lembuhus can be controlled and navigated through a channel having several bridges? A. The speed will depend upon the conditions of tide and weather prevailing at the time. I would estimate about four knots, five knots.

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Q. Now, the vessel was moved stern first through the Lackawanna Bridge, is that right? A. Yes.

Q. It was turned between the Lackawanna Bridge and the Whitpen Bridge or City Bridge, is that right? A. Yes.

Q. Did it then proceed under its own power continuously through the Whitpen Bridge, which you call the City Bridge, the freight and passenger bridge of the Pennsylvania Railroad, under the Pulaski Skyway to the Lincoln Highway, Hackensack bridge? A. Yes.

Q. Under its own power continuously? A. Continuously under its own power.

Q. At what time did the mast strike the Lincoln Highway bridge or the Hackensack bridge? A. 1557 hours.

Q. Now, you have marked on the Coast Guard chart of the area, and on the photographic enlargement, the position (112) of the vessel at various times during its course down the river. A. Yes.

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Q. You say yes. Now, you also marked on the Coast Guard chart, on the enlargement, the position of the vessel at $1553\frac{1}{2}$ hours.

Appendix A

Will you again identify this position? A. At 1553½ hours, the vessel was approximately north—approximately a ship's length, or thereabouts, north of Pulaski Skyway.

Q. About 440 feet away from the Pulaski Skyway? A. Around that.

Q. Will you identify that from the Skyway? Put it at a ship's length from the Skyway—where is the Skyway? A. This bridge here.

Q. With your red pencil, and put the time down, and (117) the length of the ship away, 440 feet or 450 feet away. A. That was at 1553 hours?

Q. 1553 hours. A. Is that the time?

Q. Is that the time that is marked on your large map? A. 1553½.

Q. Put that down. A. 1553½.

Q. Now, can we safely say that is about 200 yards or a tenth of a mile? A. Approximately, yes.

Q. Do you want to put that down. Now, take into account that the scale of the miles set forth on the Coast Guard chart—can you measure distance on this chart with reasonable accuracy? A. Yes.

Q. You can. Now, will you measure and calculate the distance from the vessel's position at 1540 hours to its position at 1553½ hours? A. .75 of a mile.

Q. .75? A. Of a mile.

Q. That is about three-quarters of a mile, more or less? A. Yes.

(118) Q. What is the elapsed time between 1540 hours and 1553½ hours? A. 13½ minutes.

Q. And the vessel traveled from the first position to the second position in 13½ minutes? A. Yes.

Q. In moving from the first position to the second, it traveled about, as you say, .75, or about three-quarters of a mile, is that right? A. Yes.

Q. In traveling this distance, about .75, as you said, miles, in 13½ minutes, what was the average speed of the vessel in knots? A. 5.7 knots.

Q. May I see your mathematics, please?

Mr. McCarter: I couldn't hear that.

A. 5.—

Q. May I see your mathematics, please? A. That—

The Court: Who speaks first?

Q. Do you find an error? A. It is. I wish to correct it.

Q. Subtract 3.42 knots; 3.42 knots. A. Yes.

(119) Q. That was the speed that you were doing for .75 miles in 13½ minutes, right? A. Yes.

Q. Will you measure and calculate the distance from the position at 1553½ hours to the Lincoln Highway, Hackensack River Bridge.

The Court: From the map?

Mr. D'Auria: Yes, sir.

Q. Do it accurately with the scale. A. .53 knots—the distance is .53 miles.

Q. .— A. 53 miles.

Q. And you did that by the position that we said we were a length away, a ship's length away from the Skyway? A. Yes, from here (indicating).

Q. And it would come to 5.3? A. No; .53.

Q. Oh, .—I am sorry, .53 miles; .553, is that right? A. .53 miles.

Q. A little less than six-tenths of a mile? A. Yes.

Q. Now, the vessel struck the bridge at what hour? A. At 1557 hours.

(120) Q. Then the vessel from that point traveled from 1553½ hour position, north of the Skyway, to the Lincoln Highway bridge in 3½ minutes, is that right? A. Yes.

* * *

Appendix A

Q. What was the average speed of the vessel in knots during this 3½ minutes immediately prior to striking the bridge? A. Nine knots.

Q. Nine knots? A. Nine knots.

Q. You traveled the 3½ minutes from 1553½ to (121) just before the Skyway at nine knots? A. Yes, from these positions in 3½ minutes.

Q. And the distance from 1540 down to 1553½, you traveled about 3.42 knots? A. Yes.

Q. And from the position north of the Skyway to the position before the Lincoln Highway bridge, you were doing nine knots? A. Yes.

Q. And a vessel of this size maintains steerageway at this speed for a distance of a mile? A. At what speed?

Q. At the 3.42 knots? A. Yes.

Q. Did you testify before that to maintain speed it had to be about four and a half or five knots to keep its steerageway? A. Yes.

Q. Can you do it at 3.42 knots? A. The point at issue here is—

Q. Please answer my question.

The Court: Can you do it at that speed?

A. Yes.

Q. At 3.42 knots instead of, as you testified before, (122) at five knots, four and a half to five knots, to maintain steerage? A. Yes.

Q. You testified a few minutes ago about the minimum speed for navigating this type of channel. What was that? A. About four and a half, five knots.

Q. You have also testified in your judgment the vessel's average speed from 1540 hours to 1553½ hours was how many knots? A. Three point four knots.

Appendix A

Q. When I asked you before, your calculations, you said, about six knots. Do you recall that? A. Yes.

Q. And your calculation was much less then, wasn't it; it was three? A. Yes.

Q. Point— A. Four two.

Q. Now, you have indicated that its actual average speed during this time was 3.42, right? A. Yes.

Q. Instead of the six knots that you estimated before. Now, you have testified that, in your judgment, the vessel's average speed from 1553¼ hours to 1557 hours, when it struck the bridge, was about six knots, is that right? A (123) maximum of six? A. Yes.

Q. You have calculated that its actual average speed during this time was how many knots? A. Nine knots.

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Recross examination by Mr. D'Auria:

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Q. Now, coming back to your position of the Skyway— do you need the map again? The Skyway, and I think Mr. McCarter could bear this out, the Skyway to the Lincoln Highway bridge was about five-tenths of a mile? A. Yes.

Q. About half a mile. Using your figures, you were a ship's length away from the Skyway, 440 feet, which we said was about a tenth of a mile, which would make that six-tenths of a mile away, is that right? A. Yes.

Q. That you were. Now, will you calculate that speed in 3½ minutes at six-tenths of a mile? A. 10.20.

Q. 10.20. So that is different than your calculation of nine knots before? A. Yes.

(143) Q. Is that right, 10.20? A. Zero.

Q. So we can safely say in 3½ minutes that the Lembulus

was doing north of the Skyway to the Lincoln Highway between nine and 10.20 knots? A. Yes.

Q. Which is almost the speed you would do in the open ocean, isn't that right? A. Yes.

Mr. D'Auria: No further questions.

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WALFRID WAXIN, called as a witness in behalf of the plaintiff, having been first duly sworn, testified as follows:

Direct examination by Mr. Julian:

Q. What is your address, Captain Waxin? A. 539 85th Street in Brooklyn.

Q. What is your occupation? A. I am a tugboat captain.

(146) Q. Who is your employer? A. Moran Towing and Transportation Incorporated.

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Q. On December 20, 1957, I understand you were employed by Moran Towing, is that right? A. That's right.

Q. What was your tug, the name of your tug? A. The name of the tug that I was on at that time was the (147) Kathleen E. Moran.

Q. Do you remember on that day assisting and undocking the Lembulus? Did your tug assist in the undocking of the Lembulus? A. The tug did assist in undocking the Lembulus.

Q. That was at Kearny Point? A. At Copper's Coke is the departure point.

Q. Well, after the Lembulus was undocked and proceeded seaward down the Hackensack River, would you tell us what your tug did? What did you do with your tug? A. After the ship was turned around and headed down-

stream, we followed the ship down toward the Pulaski Skyway and Lincoln Bridge.

Q. On that trip down the Hackensack River, was there a collision? A. Yes.

Q. What time was that collision? A. I have a notation that it is 1555 in my little book.

Q. You mean you used something to refresh your recollection? A. Yes. I have a notation of it in my little day book.

Q. Would you produce that, please.

Captain, what is that document that you have in your hand? A. That is a diary.

(148) Q. Your personal diary? A. That is my personal book.

Q. And from that diary—when did you write that entry in there? A. That entry is written on Friday, December the 20th, in 1957.

Q. The collision that you refer to and mentioned as being at 1555, was that the Lincoln Highway bridge?

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Q. Just before the collision, had you seen the bridge rising, going up? A. Yes, I had.

Q. Will you tell the Court what you saw? A. I saw the bridge start to rise to what appeared to me to be in the usual fashion of bridges rising. Then to slow down to such an extent that it was hard to tell whether the bridge (149) was still rising or had stopped.

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Q. As you followed the Lembulus down, could you see her propeller as it turned? A. Yes.

Q. Would you tell the Court what, if anything, you saw the propeller do? A. Well, as we approached the bridge,

it was evident that the opening procedure was slowing down. I noticed that the wheel of the Lembulus went into reverse. At that time, we went by the starboard quarter and up alongside of the Lembulus (150) on the starboard side.

Q. Well, at that time when you saw the wheel go into reverse, would you estimate in the same fashion as before, for the Court, how far away was the Lembulus at that time? A. Well, I would say that was just about the time or shortly after; so it must be just perhaps a little bit less than boat-length, say 350 feet or so.

Q. Did you observe the speed of the Lembulus as she approached the Lincoln Highway bridge? A. At that time, it seemed to me moving very slowly, but I wouldn't guess any actual speed.

Q. Well, from your experience as a pilot, and a tug-boat captain, would you say there was anything unusual about the speed of the Lembulus as she approached the Lincoln Highway bridge? A. Not at all.

The Court: How far out of water was her screw at the time you noticed it going in reverse?

The Witness: I don't know, your Honor, whether the screw was out of the water or not. I just noticed the commotion of the water.

Mr. Julian: Your witness.

Cross examination by Mr. D'Auria:

* * *

Q. No, sir, when did you first meet Mr. Julian? A. When did I first meet Mr. Julian? I think Mr. Julian called me on Thursday of last week.

Q. Thursday of last week? A. Yes.

(152) Q. What date was that so we may—

The Court: That should be—

Mr. D'Auria: The 27th, I think, of April.
The Court: April 28th.

Q. April 28th. And Mr. Julian called you on the telephone? A. No, I called Mr. Julian.

Q. Where did you call Mr. Julian? A. Moran's office had asked me to do so.

Q. Who in Moran's office asked you to do so? A. Actually, I think it was Mr. Joe Mesig.

Q. And what is Joe Mesig in your organization? A. His duties are pertaining to damages.

Q. Damages to what? A. Equipment.

Q. Of the Moran Tugging? A. Moran's tugs, yes.

Q. Not with the Lembulus? A. No.

Q. How long before you contacted Mr. Julian were you told by Mr. Mesig to call Mr. Julian? A. I don't recall. It might be two days.

Q. Two days before April the 28th? A. Yes.

(153) Q. And what were you told to do by Mr. Mesig, to call Mr. Julian? A. Please repeat the question.

Q. What were you told to do by Mr. Mesig when you called Mr. Julian? A. I was told Mr. Julian would like to speak to me regarding the Lembulus, in connection with the Lincoln Highway bridge, and asked if I knew anything about that.

Q. And what did you say? A. I said yes, I recall it.

Q. And what did you tell him you recalled? A. The fact that the Lembulus hit the highway bridge and bent the mast.

* * *

Q. Who was the other captain of the other tug? A. I don't know.

Q. Do you have it in that diary? A. No.

Q. You don't know who worked with you on that day on the other tug? A. That's right.

Q. You were in court yesterday and today. Do you recall the name of the pilot that was aboard the Lembulus? A. Yes, Captain John Bassett.

Q. But you can't recall who worked with you that day? A. No.

Q. You say you were following the Lembulus, is that right? A. That is right.

Q. You were astern. How far astern were you? A. A safe distance so we wouldn't be sucked into the wheel or the current of the wheel.

Q. What is the safe distance, sir? A. Well, a hundred feet.

Q. About a hundred feet behind? A. Or more.

Q. Behind the Lembulus? (155) A. Or more.

Q. How high out of the water was the Lembulus? A. Pardon me?

Q. How high out of the water was the Lembulus? A. I don't recall.

Q. Well, your tug sets very low. How high out of the water is your tug? A. The tug that I was on, the pilothouse is about—the top of the pilothouse is about fifteen feet above the water.

Q. About fifteen feet? A. That is right.

Q. But you can't tell me how high the Lembulus is? A. No, sir.

Mr. Julian: What part of the Lembulus are you referring to?

Mr. D'Auria: The stern, sir.

Mr. Julian: You didn't say so. Would you amend your question?

Appendix A

Mr. D'Auria: He said he was behind, sir, and I don't know being any other place.

Mr. Julian: You can see the mast.

Mr. D'Auria: How high above the water was it?

Mr. Julian: You can see the mast, the bridge.

Mr. D'Auria: Counsel is prompting the witness, sir.

(156) Mr. Julian: I am not prompting the witness.

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Q. How high out of the water was the stern of the Lembulus? A. I don't know.

Q. But you can remember you were about a hundred feet, more or less, behind, is that right? A. That is right.

Q. And you are only sitting about fifteen foot out of the water. Where were you, in what part of the tug were you on that day? A. The pilothouse.

Q. So, therefore, you had to look out through a glass partition? A. That is right, unless the window was open.

Q. I don't know; was it open? (157) A. I don't know.

Q. You don't recall that either? A. No, sir.

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Q. And you don't know whether the bridge stopped at all? A. No.

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Q. How long did it take you from the 150 feet, more or less, that you were, to get up to that right side of that vessel? A. I don't know.

Q. Why did you make the maneuver. A. To be where I could see the pilot and be of assistance to him if he should want me

Q. But he didn't call for any assistance from you, did he? A. No.

Q. What did the other tug do, if you remember? A. I don't know.

Q. You don't know what they did? A. No.

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Q. Did you make any report of this incident to your company? A. No.

Q. Did you enter it in your log? A. I don't know.

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Q. Now, you spoke to Mr. Julian on the telephone, is that right? A. That is right.

Q. What was your conversation with Mr. Julian? A. Please—

Q. What was your conversation with Mr. Julian over the (164) telephone? A. Mr. Julian, as far as I can recall, asked me if I recalled being on the job with the undocking of the Lembulus from Copper's Coke on the 20th of December, 1957.

Q. What did you say? A. I replied. I believe, that I remembered such a thing, but that I had to look up the date. I wasn't too sure about the date.

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Q. Now, what position was your tug in when you left the Copper's Coke Wharf? A. I don't recall it.

Q. You don't recall what position you were in? A. No.

Q. Do you recall what you did with the Lembulus at (171) that point when you took it away from the wharf? A. No.

Q. You don't remember the position you were tied up in? A. That's right.

Q. Can you tell us what you did with the Lembulus then, what your part was with the Lembulus at Copper's

Wharf? A. Our part was to assist in unlocking the Lembulus. Just exactly how this was done, I don't recall.

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Q. How many times have you undocked a vessel from Copper's Wharf? A. Dozens.

Q. Do you recall what position your tug was in when the Lembulus was going through the Lackawanna Bridge? A. No.

Q. You don't recall? A. No.

Q. Your job, you say, was to undock the Lembulus right (172) from the wharf? A. That's right.

Q. So it can continue down under its own power? A. That's right.

Q. You recall whether or not you had tied up to the Lembulus or whether you were just pushing, as they say, nosing it out? A. I don't recall.

Q. Do you recall if you were behind the Lembulus when it was going through the Lackawanna Bridge? A. No, I don't recall.

Q. Do you recall if the Lembulus went through the Lackawanna Bridge stern-first or bow-first? A. I don't recall.

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Q. And you don't recall whether or not the Lembulus on that date, at about 3:29, as to which way it went through the Lackawanna Bridge, whether it was the bow or the stern? A. I don't remember it.

Q. And you don't remember how you went through the bridge? A. No.

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[*Excerpts from Deposition of C. Peschken, Read into Record.*]

"Q. Now, will you tell me whether or not at the time of the approach of the Lembulus on December 20, 1957, you at any time gave it three blasts of the siren signal? A. No.

Appendix A

Q. Can you give me a reason why you did not give it pursuant to this rule that I have just quoted? A. They accept that as a signal for them to come ahead, and I have never yet had cause to give three signals for a boat to come ahead until I thought he had clearance, for the simple reason you never know when your electrical power is going to be bad. It is a safety precaution why I do that.

Q. Well, then you rely on your personal judgment as to whether a three-blast signal should be given, is that correct? A. Exactly.

Q. Your judgment is based on your personal observation of what is going on, is that right? A. That's right.

Q. Now, in this particular case, what did you (190) observe that made you determine not to give the three-blast signal? A. I didn't observe anything. I couldn't see him, but I knew he was awful high so he wouldn't have got the signal until I was all the way up."

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"Q. Can you tell me whether your bridge had reached the nearly open limit by the time of the impact of the Lembulus? A. No.

Q. It had not reached it? A. No."

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"Q. Now, it goes on to say, 'If it appears that the nearly open limit will be required then the bypass shall be used and the stand raised to the fully open limit.'

Frankly, I am not too clear on what that means. Can you tell me what that means? Can you tell me what that (192) means? A. You come back to normal, to neutral with your control, control mechanism. Then you start over again, but you can only go to a certain speed up to the fully open position. That is 100 feet.

Q. Now, did I understand it then, that under— A. You have got to stop at that particular—that nearly open limit. You have to stop there.

Q. I get it. A. She automatically stops. Then you have to start from scratch in order to go them few feet further.

Q. And, as you recall, that is somewhere in the neighborhood of ten additional feet, is that right? A. Somewhere in that neighborhood. I don't recall exact.

Q. I suppose we can find that out somehow or other. Well, now, when you have reached the nearly open limit and have come to the stop, the automatic stop which that requires, has the counterweight come down far enough to obscure window A on your sketch, P-4? A. Yes.

Entirely obscures it? A. Yes."

William G. Hagen, called as a witness in behalf of the defendant, having been first duly sworn, testified as follows:

Direct examination by Mr. D'Auria:

Q. Sir, will you give your full name? A. William G. Hagen.

Q. And your address? A. 44 May Drive in Berkley Heights.

Q. New Jersey, is that? A. Berkley Heights, New Jersey.

Q. Sir, do you hold a pilot's license? A. Yes, sir.

(201) Q. Can you tell me for what area that license is? A. Just all of New York harbor, all of New York harbor.

Q. Does that include the inland waterways and the Hackensack? A. Yes, sir.

Appendix A

Q. Sir, I am going to ask you to identify these pieces of paper that I hand you. A. That is the pilot order for the day I was—

Q. Speak loud enough so his Honor—his Honor has to hear you. Face him when you speak. A. This is the pilot order for the day that I was aboard this vessel, the Lembulus.

Q. Does it state the date on there, sir? A. Yes, sir, 12/20.

Q. Now, what is the second piece of paper? A. That is a bill for the piloting service from Copper's Coke to Stapleton.

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Q. Now, sir, you have been to Copper's Coke before, is that right? A. Yes.

Q. And you have gone up and down this channel before December 20, 1957, is that right, sir? A. Yes, sir.

Q. Now, have a seat. Oh, first, will you tell me the first bridge, or the first bridge going south from Copper's Coke? A. The Delaware-Lackawanna Bridge, right here.

Q. Now have a seat. On December 20, 1957, you received orders to board the Lembulus, is that right, sir? A. That's correct.

Q. Tell us how you boarded the Lembulus, please. A. I rode up on the Moran Tugboat with Captain Bassett. (205) They offered a passage to pilots going to remote docks like that.

Q. So you rode up with Captain Bassett and you boarded the Lembulus where? A. At Copper's Coke.

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Q. I show you P-6, known as the engine movement book, (207) and ask you to start at page 21, and look at it from

1529½, under the part known as engine movement, down to the same time that I asked you to look at the previous book.

Now, sir, when you boarded the Lembulus up at Copper's Coke, where were you; in what part of the vessel were you? A. I was on the bridge.

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Q. Do you recall what movement of the vessel was made before it went through the Lackawanna Bridge? A. As I recall, I believe the ship was turned above the Lackawanna Bridge.

• • •

Q. Do you recall the weather that day on December 20, 1957, at about 3:30? A. It wasn't too nice a day, as I recall.

Q. In other words, would you say it was a day that it rained? A. Yes, sir.

Q. Did you notice anything about the channel at all, (209) whether it was rough or otherwise? A. No, I can't recall. I mean, it probably wouldn't be rough there in that area.

Q. A you went downstream, do you recall if you remained in the bridge of this vessel? A. Yes, I was on the bridge.

Q. As you approached what we call the Lincoln Highway or Hackensack River bridge, do you recall any unusual movements of that bridge? A. Well, it's a slow bridge to begin with, but, as far as I can recall, she went up but slowly.

Q. Do you recall the bridge, or have you ever seen the bridge, stop? A. No, I can't remember.

Q. Do you recall the foremost mast of the vessel striking the bridge? A. Yes, sir.

Q. Meaning the Hackensack and Lincoln bridge? A. Yes.

Q. You do recall that? A. Yes.

Q. Can you tell me, if you can after the foremast struck the Lincoln Highway bridge, what happened? A. You mean the—

(210) Q. Aboard the vessel. A. Aboard the ship?

Q. Yes. A. Well, it continued through the bridge, I believe, because we hit the main mast.

Q. Did you notice what occurred on the deck of the bridge? A. Some rigging fell down, I believe.

Q. After you went through the draw of the bridge, after the foremast struck the bridge, how far down did the vessel continue before you took over? A. I believe we left Captain Bassett off down near the Bayonne Bridge.

Q. And then—

The Court: That is Kill Van Kull?

The Witness: Yes, sir.

Q. You helped to pilot then to Stapleton, Long Island? A. I took the con then. I relieved Captain Bassett.

Q. Therefore, you never completed your mission aboard that vessel? A. That's correct.

Q. To take her out to the ocean? A. Yes.

Q. After you arrived at Staten Island and the vessel, I (211) imagine, was docked, did you leave the vessel? A. Yes.

Mr. D'Auria: No further questions.

Cross examination by Mr. Julian:

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Q. As a matter of fact, Captain, you really have no personal recollection today that you could swear to under oath as to how that Lembulus left Copper's, do you? A. Well, I think—almost every ship I have been on has always turned

off the deck and gone head down through the (214) bridges.

Q. That is because you are relying upon what has usually happened, isn't that it? A. I think it would be rather unusual if she went through stern-first.

* * *

The Court: Now, the vessel, I take it—how long was she?

Mr. Julian: 445 feet, if I remember correctly.

The Court: Now, assuming that, the width of the channel, as you estimated it, opposite the wharf, would you undertake to turn this vessel in a channel of that width at that point?

The Witness: This is off the Copper's Dock?

The Court: Yes.

The Witness: Oh, definitely, yes.

The Court: You could do it?

The Witness: Yes.

The Court: I just wanted to know.

Mr. Julian: No further questions.

* * *

HERBERT A. SMITH, called as a witness in behalf of the defendant, having been first duly sworn, testified as follows:

Direct examination by Mr. D'Auria:

Q. Mr. Smith, your full name and your address, please. A. Herbert A. Smith, 403 41st Street in Union City.

Q. Mr. Smith, you are employed by whom? A. Lackawanna Railroad.

Q. Speak loud enough. A. Lackawanna Railroad.

The Court: Mr. Smith, I am the one that has to decide this case, so I want to hear you.

Appendix A

(219) Q. Mr. Smith, on December 20, 1957, at about 3:30, were you employed by the Lackawanna Railroad? A. I was.

Q. In what capacity were you employed? A. Bridge tender.

Q. And at what bridge were you employed at that day, were you working? A. Lower Hackensack Bridge, Duffield Avenue, Jersey City.

Q. Now, would you say that that is close to the Copper's Wharf, what is known as Copper's Wharf? A. That's right.

Q. And this bridge is over the Hackensack River? A. Right.

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(220) Q. Do you have your log book with you, sir? A. I have.

Q. Would you tell the Court at what time you opened that bridge for a vessel known as the Lembulus? A. It was at 3:24 p.m., December the 20th.

Q. Now, before you opened the bridge for the Lembulus, did you observe what this vessel did before it went through your bridge, through your draw? A. She has to go up to a turning point at the end of the Public Service building in order to turn the ship, to have the bow facing—going south, going south.

Q. Did, in fact, that happen? Did you actually observe it? A. Yes, they turned it.

Q. At what time did the vessel, the Lembulus, go through your drawbridge? A. Well, I cleared him at 3:42 and at 3:48 he cleared me.

Q. Were there any other boats with the Lembulus? A. There was two tugs, Pauline and the Margaret Moran.

Q. Are they all logged in your book? A. Right.

The Court: When did the Lembulus clear, did you say?

The Witness: It was 3:42 to 3:48, I was closed.

Q. And the Lembulus went through your bridge bow-first? (221). A. Right.

Mr. D'Auria: No further questions.

• • •

JOHN P. FALLON, called as a witness in behalf of the defendant, having been first duly sworn, (226) testified as follows:

Direct examination by Mr. D'Auria:

Q. Mr. Fallon, your full name and address? A. John P. Fallon, 138 Duncan Avenue, Jersey City.

Q. Mr. Fallon, you are employed by the Lackawanna Railroad? A. Lackawanna Railroad.

Q. And on December 29, 1957, were you employed by the Lackawanna Railroad? A. Right.

Q. At about 3:30 p.m.? A. Right.

Q. Where were you employed, in what position? A. I am employed at the lower Hackensack drawbridge over the Hackensack River.

Q. Is that near the Copper's Coke Wharf? A. That is near the Copper's Coke.

Q. And on that day, at 3:30, December 20, 1957, do you recall the Lembulus going through your draw? A. Right.

Q. Do you recall the time? A. Yes, sir.

Q. What time was it, sir? A. Why, we were up 130 feet at 3:42, and we were closed at (227) 3:48.

Q. Can you tell us in what manner the Lembulus went through your draw? A. Well, in that six minutes.

Q. Did it go through bow-first? A. Box-first.

Q. Did you observe it when it went up the channel? A. That's right.

Q. What did you observe when it went up the channel? A. I observed she pulled away from the dock, the bow of the boat was headed north; so they had to turn her around to bring the bow facing south, to go through the channel of the bridge.

Q. Do you recall at any time any vessel going through stern or backwards through your bridge?

Mr. McCarter: I object to that question about any vessel. Not in issue here at all.

The Court: Objection sustained on direct.

Mr. D'Auria: No further questions.

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JOSEPH CURRAN, called as a witness in behalf of the defendant, having been first duly sworn, testified as follows:

Direct examination by Mr. D'Auria:

Q. Mr. Curran, are you employed by the Pennsylvania Railroad? A. I am.

Q. On December 20, 1957, were you employed by the Pennsylvania Railroad at about 3:30? A. I was.

Q. Were you on duty? A. I was.

Q. Where? A. On the Hackensack Bridge, Jersey City.

The Court: That is the Pennsylvania Railroad Bridge?

The Witness: Pennsylvania Railroad Bridge.

Q. Do you have your log with you? A. I have my log sheet.

Q. Do you recall on that day what time you opened up (230) the draw of your bridge for the Lembulus? A. The bridge was opened at 3:45 and the ship arrived at the

bridge headed through the bridge at 3:48. The bridge was closed for rail traffic at 3:51.

Q. And do you recall whether or not any other boats passed with the Lembulus? A. There were two tugboats, two Moran tugs.

Q. Now— A. One alongside and one following.

Q. Do you record the name of the vessels that go through? A. We do record them. I have it on my sheet here. S. S. Lembulus.

Mr. D'Auria: No further questions.

Mr. McCarter: No questions.

The Court: No cross. Step down, please.

Canolius Hines, called as a witness in behalf of the defendant, having been first duly sworn, testified as follows:

Direct examination by Mr. D'Auria:

Q. Mr. Hines, where do you live? A. 243 South Burnett Street, East Orange.

Q. Whom are you employed by? A. State Highway.

Q. State Highway Department? A. Yes.

Q. In what capacity are you employed? A. Gate attendant.

Q. On December 20, 1957, about 3:30, were you employed by the State of New Jersey on that day? A. Yes, I was.

Q. Where were you assigned? A. Hackensack River Bridge, Lincoln Highway.

Q. What were your hours that day? A. Four to twelve.

Q. Do you recall the Lembulus going up the Hackensack River going north that day?

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Q. On that day, do you recall whether it was going down the river, south? A. Yes. South.

Q. Speak up. (232) A. Yes.

Q. You do recall it? A. Yes.

Q. Will you explain to the Court just what your duties are? As a gate tender on that bridge? A. To lower the crash gate and close the barrier gate, observe all traffic, river traffic, to advise the operator in charge of an opening or anything unusual.

* * *

Q. After you notified the operator that the steamer was coming, what did you do next? A. I went downstairs.

Q. Then what did you do? A. Stood by for the signal from him to lower the crash gate and close the barrier gate.

Q. Did you do that? A. Yes.

Q. Did you receive the signal—when did you receive the signal from the operator to do that? A. Do you want the exact time?

Q. No. You notified them that there was a vessel coming? A. Yes.

Q. Then you say you went back downstairs. When did you receive the signal from the operator to do your job to go out and close the gate? A. Momentarily. I can't say exactly how many minutes or anything.

Q. After you closed your gates, were the gates on the other side close at the same time that you are performing your (235) duties? A. Yes, we work as a team in sequence.

Q. After all traffic was stopped, did you give a signal to the operator that all traffic is stopped? A. No. He has indication upstairs on his own board that the traffic has stopped.

Q. And that all gates are closed? A. Yes.

Q. What position do you take after the gates are closed?

A .On the turtleback which is—it's a divider for the highway, and I notified the operator that he can start to go up.

Q. Did you hear a whistle from the boat, from the vessel? A. A whistle?

Q. Yes. A. Yes.

Q. You did hear it blow? A. Yes.

Q. Did you hear the whistle given by the bridge tender, the bridge operator, rather?

Mr. McCarter: I object to that. There is no foundation laid for that question.

The Court: Why not?

Mr. McCarter: We said, "Did you hear the whistle." (236) We haven't laid a foundation that there was one.

The Court: I will overrule the objection. Did you?

Q. Answer. A. Yes.

Q. All right, how many blows of the whistle did the bridge operator give? A. Two.

Q. Now, after the two whistles, did you observe the bridge moving? A. I don't understand the question.

The Court: You mean the draw section, don't you?

Q. The draw section of the bridge, did it start to move; did it rise? A. Subsequently.

Q. Your gates are closed. You went back to your position and you heard the boat vessel whistle, and you heard the bridge whistle, too. What did you observe then, did the bridge rise? A. Yes, it started to rise.

Q. It started to rise? A. Yes.

Q. While the bridge was going up and you were—were you observing the vessel? A. Did I observe the vessel?

Q. Yes. (237) A. Yes.

Q. What did you observe about the vessel? A. That it was moving very fast.

• • •

Q. After you observed this vessel moving, as you said fast, what did you do? A. I went upstairs and I spoke to the operator in charge. I told him that this steamer seemed to be coming damn fast.

Q. Those are the words you used? A. Yes.

Q. What did the operator do, do you remember? A. Nothing. There is nothing he could do. He just looked at me and I went back downstairs to my post.

Q. Did he give another signal? A. He blew twice.

Q. After you told him that? A. "Bah, hah."

Q. That the vessel was going damn fast? A. Yes.

The Court: How long after you had informed the bridge (238) operator that the vessel was coming fast did he blow the two blasts, the second of the blasts.

The Witness: Momentarily.

The Court: You mean by that within a moment after that?

The Witness: Yes, that's right.

Q. You went back to your position, is that right, after you warned him about that? A. Yes.

• • •

The Court: Can you tell us, while you were going downstairs, whether the bridge was continuing to rise?

The Witness: Yes.

The Court: So that the vessel was approaching and the draw section of the bridge was continuing to rise, is that correct?

The Witness: That's right.

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Q. As his Honor asked you, you observed the bridge rising. Did the bridge stop, that you know of? A. No.

Q. It did not? A. No.

Q. Did you see the vessel with its foremost mast collide with the bridge? A. Yes.

Q. Did you see the main mast, which is about 200 feet back from the foremost mast, strike the bridge? A. No.

Q. Did the bridge stop at any time during this period of time it was first struck by the foremast of the vessel? A. No.

* * *

Q. Now his Honor just asked you if you know about where, when you got back downstairs after you warned the operator, as to the speed going damn fast; was it below the Skyway or was it at the Skyway, do you recall that, in that location; not exact, but where? A. He was below the Skyway.

Q. When he received the second warning of the two blasts? A. That's right.

Mr. D'Auria: No further questions.

Mr. McCarter: No questions, sir.

FRED W. BENTS, called as a witness in behalf of the defendant, having been first duly sworn, testified as follows:

Direct examination by Mr. D'Auria:

Q. Your address, Mr. Bents? A. 816 Columbia Avenue in North Bergen, New Jersey.

Q. Mr. Bents, you are employed by the State of New Jersey? A. Yes, sir.

Q. In what capacity? A. Bridge attendant, grade one.

Appendix A

(241) Q. On December 20, 1957, Mr. Bents, between 3:30 and 3:54, what bridge were you assigned to? A. Hackensack River bridge.

Q. Is that the Lincoln Highway? A. No.

Q. Well, it is also known as the Lincoln Highway bridge, isn't it? A. Yes.

Q. Besides the Hackensack River bridge? A. Hackensack River bridge, that's right.

• • •

Q. All right, take your seat. Did you hear any signals from the Lembulus? A. Yes, three blasts.

Q. Did you hear any given by our bridge? A. Yes, two blasts.

• • •

Q. Could you say anything about the speed of the vessel? A. I don't know. It seemed as though it was creeping up on us fast.

Q. It was? A. Yes.

Q. Did you also observe our bridge? A. Yes.

Q. While it was rising? A. Yes, sir.

Q. Did the bridge stop at any time while it was rising? A. No.

Q. Did you observe the vessel, the Lembulus, when its foremast struck the drawbridge? A. Say that again, please?

(Last question repeated by Reporter.)

A. Yes, I saw it.

Q. Now, was the bridge stil rising when it was struck by the Lembulus' foremast? (246) A. Yes, sir.

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Q. The foremast and the main mast are about 200 feet apart? A. That's right.

* * *

Q. Did you see the main mast? What happened to the main mast? A. The first mast?

Q. The second—the first mast is the foremast. A. The second mast just about touched.

Q. Just about? A. The bridge.

* * *

(248) JERRY IANNACCONE, called as a witness in behalf of the defendant, having been first duly sworn, testified as follows:

Direct examination by Mr. D'Auria:

Q. Mr. Iannaccone, what is your address? A. 15-01 George Street in Fair Lawn, New Jersey.

Q. And you are employed by the State of New Jersey, sir? A. That's right.

Q. In what capacity? A. District Electrical Supervisor.

Q. Were you notified about any electrical difficulty on the Hackensack or Lincoln Bridge? A. I was.

* * *

Q. About what time were you notified? A. Well, I can't recall exactly, but I was notified, I believe twice that there was some sort of trouble on that bridge.

Q. Can you tell us the year and the month? A. It was prior to December 20th of that year.

Q. 1957? A. That's right.

Q. Did you go to that bridge as a result of a call that (249) there was electrical difficulty? A. I did.

* * *

Appendix A

Q. Mr. Iannaccone, can you tell me just what this difficulty was and what was causing it? A. Well, at the time, I said I couldn't tell then. But now we know; and, of course, it's been corrected. It was in the control of the bridge; it was in the leveling control mechanism. The bridge has a leveling mechanism which keeps the bridge level, and if it goes out of level too much, it automatically stops the bridge.

* * *

Q. Well, as your investigation—what did you find out; how many speeds are there on the bridge? A. There are six accelerating speeds.

Q. And while the bridge was having this difficulty, what was the safe speed of the operation of this bridge? A. The safe speed?

Q. Well, I guess—I suppose full speed was safe speed, because there is no regulation telling you how fast you should operate the bridge.

The Court: Let me ask you this: did you on any occasion, when you were checking to find out what was wrong with the bridge, try it out yourself?

The Witness: Yes, I did.

The Court: And did you find that it operated through the six speeds that you mentioned?

The Witness: Yes, it did.

The Court: All right.

The Witness: On one occasion, I believe on one occasion, it acted up; but it never showed up again while I was there. That was a high speed.

Q. As a result—

(252) The Court: Let us get his answer.

The Witness: That was at high speed.

Q. As a result of your investigation, did you gain any knowledge as to what speed was a safe speed to operate this bridge without it stopping? A. Well, we found that it wouldn't happen as frequently on lower speeds.

Q. And by lower speeds, you mean what? A. About three power points.

Q. Now, you did have a conference with whomever the bridge operator was at that time? A. That's right.

Q. And have you consulted with Mr. Peschken? A. I did.

Q. And did you speak at what the safe speed was to operate this bridge? A. I did.

Q. And what speed was that? A. I told him it was best operated at the reduced speed because it wouldn't occur at close intervals.

Q. And that slow speed was what? A. Three power points.

• • •

The Court: Wait a minute. You can object to the Court's question, too, but the answer is improper, not necessarily implicit in the question. Strike the answer.

Did you, yourself, by personal tests in the operation of the bridge draw, determine that the third power point was the fastest at which it could be operated with assurance that no trouble would occur?

The Witness: I did.

(254) The Court: And that would be about how long before the 20th of December?

The Witness: Oh, I would say about two to three weeks.

The Court: And did you thereafter inform the bridge operator of your experience in making those tests which you found?

The Witness: I did.

The Court: Go ahead.

Appendix A

By Mr. D'Auria:

Q. How fast is that point three? What percentage is that in relationship to the full speed, to six? A. Between 35 and 45 per cent of full speed.

Mr. D'Auria: No further questions.

Cross examination by Mr. McCarter:

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(256) Q. Do you know whether or not any report was made to the Coast Guard as to this potentially dangerous situation on your bridge? A. We didn't think it was dangerous.

Q. So far as you were concerned, you were the person who has the responsibility, I take it, of making that decision? A. That's right.

• • •

Redirect examination by Mr. D'Auria:

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Q. Did you have a conference with anyone, any other person, other than Mr. Henderson, who was your superior?

Mr. McCarter: When, please?

Q. During the time of this electrical difficulty with the bridge. A. Yes, I did.

• • •

Q. Did you have it before or after the accident? A. Before.

Q. And who was that with? A. The bridge designers, the people that designed the span.

Q. And did they give you any assistance in this? A. Well, they were puzzled as to what was happening also, until I proved to them what was happening.

Q. What was happening, Mr. Iannaccone? A. Well, in order to explain this fully, we'd have to go into great detail. But to give you the gist of it, this type of a bridge, a vertical lift bridge, is suspended from the counterweight by ropes. In other words, there is two counterweights and the rope attached to the counterweights, and they (263) go over sheave wheels, and they are fastened to the span.

Well, this trouble was caused primarily due to the slippage of the ropes around the sheave wheels. In other words, all the switches, limit switches, were fixed in one box, but no one ever dreamed that the ropes, these sheave wheels, would slip around there and put our limit switches out of adjustment. That was the cause of this trouble that we had.

* * *

Q. And that happened at what speed? A. It happened at high speed.

Q. And as a result of that, then, that's the time you had your conversation with the bridge operators about the low speed? A. That's right.

Q. And to operate it at that speed three, which was a safe speed? A. That's right.

Q. Did you receive any complaints at that speed that anything was happening to the bridge? A. No.

Q. What are your responsibilities in your position, your duties? A. I have a great many responsibilities. I have the responsibility of all the electrical installations in the counties of Bergen, Passaic, Essex, Hudson, parts of Union and parts of Middlesex; all the electrical installations, including traffic signals, drawbridges, movable draw-

bridges, highway lighting, street signs; anything electrical in that area.

• • •

Q. But what do you actually do? How many men do you supervise? A. Well, I supervise about 35 men.

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Recross examination by Mr. McCarter:

Q. Did you get any help from the bridge designers in repairing this defect? A. No.

Q. Did your staff take care of repairing it? A. That's right.

Q. Any work requisition of any kind made for that work? A. Well, I believe there is parts that we purchased to correct this, the record of parts we purchased to correct it.

• • •

Q. Do you recall from whom the parts were purchased? (266) A. The specific manufacturer?

Q. Yes. A. Waldron Manufacturing Company.

Q. That is in New Brunswick? A. Yes, a company manufacturer.

Q. That is part of the Mid-Land Ross Corporation? A. Yes.

• • •

Redirect examination by Mr. D'Auria:

• • •

Q. Did you ever have any occasion to have to notify (271) the Coast Guard about the bridge not opening? A. Only when we are going to do work on the span and we

are unable to open the span, we make application for a span closure.

Q. And that is made with whom? A. That's made with the Coast Guard through my superior.

Q. Have you ever had occasion that you had to do that? A. Once or twice we have, yes.

Q. So at all times, this particular bridge, the Hackensack Bridge, you felt was safe to operate? A. I was—I did.

* * *

CHARLES PESCHKEN, called as a witness having been first duly sworn, testified as follows:

Direct examination by Mr. D'Auria:

Q. Mr. Peschken, your address, please? A. 320 Governor Street in Paterson.

Q. You are employed by the State of New Jersey. A. That's right.

Q. In what capacity? A. Chief Drawbridge Operator.

Q. What bridge are you assigned to? A. Hackensack River Bridge, Route 1 and 9.

Q. Were you assigned to that bridge on December 20, 1957? A. I was.

* * *

Q. I show you a copy of the rules that are issued by the Secretary of War, which state it was approved July 8, 1933, by George H. Dern.

Can you identify that? A. I have seen that before.

Q. You have seen these before. Do you know the rule about the sounding of the whistle as to the opening of a drawbridge? A. I do.

* * *

Q. I will read this part of the rule 4 on the reverse side of the page.

> "In case of delay in opening the draw, as is provided for in these regulations, or as may be necessary by accident to the machinery or other contingency, the signal from the vessel shall be answered by two long blasts of a whistle or horn from the bridge."

Is that right? A. That's right, sir.

Q. As the operator of the bridge, what is the number of blasts that you usually give?

(275) Mr. McCarter: I object to that; for what purpose, when, and so on.

The Court: Yes.

Mr. D'Auria: At any time, sir.

Mr. McCarter: Under what circumstances?

The Court: We are interested in what was given this time. Objection sustained; go ahead.

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Mr. McCarter: Of course, I think I can also concede —I don't want to make a big argument out of nothing here—I think I can concede safely that the rule with reference (278) to the use of two blasts as a warning signal, which was referred to by Mr. D'Auria, was, in fact, the rule in effect on the date of this collision. I don't think there is any question about that. I think that is the only important part of this.

Mr. D'Auria: That's right.

The Court: Are you willing to so stipulate?

Mr. McCarter: I'll stipulate that.

The Court: That in case of difficulty with the bridge lift—

Mr. D'Auria: Case of delay, your Honor.

Appendix A

The Court: In case of delay in getting the bridge open, a two-blast warning signal is to be given by the bridge tender.

Mr. D'Auria: That's right.

By Mr. D'Auria:

Q. Mr. Peschken, on December 20, 1957, between 3:30 and 3:54, were you given a warning or notice that the vessel known as the Lembulus was heading south to go through your draw? A. I was.

• • •

Q. As soon as they saw the vessel, the Lembulus, what did you do? (280) A. I advised the two attendants to go down, get ready to close the gates. As soon as they got downstairs, I changed the traffic lights, pushed the button to change the traffic lights. When I seen the red light up, I gave them the signal to close the gates. Immediately after, I had the lights on the board that showed that the gates were all closed. We started to open the bridge. I blew the two blasts for the ship.

The Court: Let me interrupt, if I may. You say you blew two blasts from the bridge as a signal to the ship, is that right?

The Witness: That's right.

The Court: And what purpose were those two blasts blown for?

The Witness: Possibility of a delay.

The Court: Possibility of delay. Go ahead.

Q. Now, did you hear any blast or any whistle from the vessel itself? A. When he got down close to the bridge, he blew. That was the only one I heard.

Q. The only one you heard? A. That was all.

Q. So you proceeded to start the bridge in motion, is that right? A. I did, as soon as we had the traffic stopped and the (281) gates closed.

Q. At what speed did you move this bridge? A. The third power point, as high as it went.

Q. And while this bridge was in motion on your third power, did you receive another notice from the bridge attendant? A. Yes.

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Q. What notice were you given? A. Mr. Hines came running up the stairs as fast as he could and informed me that that ship was coming down pretty fast.

Q. After you were informed of that, what did you? A. I blew him down again, give him two more blasts.

Q. What did you blow? A. I blew the horn.

Q. How many times? A. Twice.

• • •

The Court: Mr. Peschken, you told us that after your first two blasts from the bridge, which you say signified or were intended to signify the possibility of delay, you heard no further blasts from the vessel until she got close. How close?

The Witness: I couldn't say.

The Court: All right.

The Witness: I could hear him then.

The Court: The second two blasts which you gave from the bridge, were they given after the blast from the vessel?

The Witness: Immediately after they give me the blast, because, at that time, is when Mr. Hines told me it was coming fast.

Q. When you were in that booth, were you observing the movement of the bridge? A. I am.

Q. Did the bridge stop at any time? A. It didn't stop at all.

Q. Did it continue to rise to its full height? A. It did.

• • •

Q. Previous to December the 20th, 1957, did you have any electrical difficulty while you were operating the bridge? A. I did.

Q. What difficulty did you have? A. The power would kick off. It would cut off altogether.

Q. And at what speed would this happen at? A. It would happen at four, five, and six power point. You could never tell definitely. I tried it at various points, after it got so that it happened frequently.

Q. Did you notify anybody about this power trouble that you were having? (284) A. Mr. Iannoccone had been notified about it.

• • •

Q. As a result of this conversation, what was the safe speed decided at to operate this bridge so that it wouldn't have a power failure? A. In view of the fact that it had never stopped, had no power failure on the third point, we decided that possibly it would have been best to operate on third point from then on until the trouble was located.

Q. Prior to December 20, 1957, you say that you have operated this bridge safely on the third power? A. That's right.

Q. And it never stopped, or the power never failed? A. That's right.

Q. Up to the time, sometime after December 20, when the difficulty was located and repaired, is that right? A. That's right.

Q. During that period of time, had you had any other large vessels, as large as the Lembulus, go through your draw? A. You mean during the time of that trouble?

Q. Yes, sir. A. We've had coal steamers going up towards—to Copper's (286) Coke.

Q. And they have had no difficulty going through your draw? A. No difficulty.

• • •

Q. Can you explain to the Court why you give two blasts before the opening of the bridge?

Mr. McCarter: That has already been covered hasn't it?

The Witness: I think I explained that to the Court.

(287) The Court: Yes, in case of delay trouble.

The Witness: Traffic conditions.

Q. And on this particular day, you did give the two blasts? A. That's right.

Q. And you again gave the two blasts when Mr. Hines notified you about the speed of the vessel? A. That's right.

• • •

Cross examination by Mr. McCarter:

• • •

Q. You told the Court that you did not see the Lembulus hit the bridge, but that you did see it when it was in the draw. Can you clear that up for us? That seems to be an inconsistency. A. When I could see him, he was clear of all obstruction that is in front of me.

• • •

Q. "A. Due to the construction of the bridge, the superstructure of the bridge, I can't see him. But when the deck is up in the air and he is practically entering the channel, then I can see the bow of the boat."

Do you remember that, sir? A. I remember that.

• • •

WILLIAM W. KUHNE, called as a witness in behalf of the defendant, having been first duly sworn, testified as follows:

Direct examination by Mr. D'Auria:

• • •

Q. Captain Kuhne, do you have a pilot's license for navigating the Hackensack River? A. Yes, sir.

Q. Have you been up that Hackensack River, up and down as far as Copper's Coke? A. Yes.

Q. As a pilot or as a Master? A. As a Master of tugboats and mate.

Q. Sir, have you ever been a Captain or a Master pilot of a vessel as large as the one—as the Lembulus which was 445 feet long and 55 feet at the beam? A. Yes.

Q. You have? A. Yes, sir.

Q. Are you familiar with the channel, sir? A. Yes.

Q. I mean with the Hackensack River channel? A. Yes, sir.

(306) Q. Now, taking into consideration the following conditions: low tide, occasional rain, southeast wind, fresh to strong, what, in your opinion, is the minimum speed at which a vessel the size of the Lembulus could be steered and maneuvered through the channel, from Copper's Wharf to the Lincoln Highway bridge?

Mr. Julian: I have an objection to that on the ground, your Honor, that he has not stated the trim or the ballast of the Lembulus.

• • •

Q. Sir, stating that the vessel was traveling light, in ballast, was 413 feet zero aft, 17 feet aft at the time the draft—at the time of the accident was—I can't—

The Court: You had better put your joint eyeglasses on and see if you can get that correct now. The witness will be confused.

Mr. D'Auria: I better show him this part from its own log as to the trim of the ship.

The Witness: Thirteen feet forward and seventeen feet aft.

(307) Q. Now, with that—

Mr. Julian: May I ask your Honor at this time whether any wind velocity was mentioned at the time? I think he used overall expressions such as "fresh"—

The Court: I think he used fresh, southeast.

Mr. D'Auria: It was strong.

Mr. Julian: Strong southeast. Is that in your question?

Mr. D'Auria: That's right, sir.

The Court: Do you have all those facts in your question, Captain?

The Witness: Yes, sir.

The Court: Finish your question. Put your question to him having those in mind. Have you an opinion?

Q. Having all of those factors which I gave you, what, in your opinion, is the maximum safe speed for a vessel the size of the Lembulus in this position—I am sorry, at the

time—the question I gave you was the minimum speed at which a vessel the size of the Lembulus could be steered and maneuvered through the channel from Copper's Wharf to Lincoln Highway? A. Yes, sir.

Q. What was the safe speed? A. The safe speed?

Q. The minimum. (308) A. Would be about three and a half to four knots.

Q. That's the minimum? A. Yes, sir.

Q. Now, add to the conditions which I gave you before, what, in your opinion, would be the maximum speed in this channel? A. Maximum speed, I should say, would be about nine and a half, probably ten.

The Court: Maximum safe speed or maximum speed?
The Witness: Maximum speed.

Q. What would be the safe speed? A. The safe speed would be three and a half to four. Nine and a half to ten would be excessive.

Q. Would be excessive? A. Excessive.

Q. Let us assume that, in a channel of this type, under the weather and the tide conditions described previously, a vessel the size of the Lembulus made a run about a mile and a half, starting at full ahead from a previous condition of slow ahead, maintaining the full ahead condition for six minutes, what, in your opinion, would be the maximum speed of the vessel at the end of the full ahead period? A. I should say about ten knots, about ten knots.

• • •

Cross examination by Mr. Julian:

• • •

Q. Five point seven knots. Now, if a ship were going from this position at Point C, and full ahead were ordered

at this point, run for about six minutes, and there were various other engine maneuvers down to striking the bridge at 1557, taking all of that into account, would you say that an average speed of six knots between Point C and Point E is a good speed, safe speed? A. No, it's a little to excessive.

Q. In what respect, Captain? A. With respect to the closed bridge. He wasn't able to stop his vessel in due time. He was too late in recognizing that the bridge wasn't open.

Q. Who told you that? A. That's what I take for granted. He struck the bridge.

• • •

Q. Didn't you, yourself, say that, as you are approaching a bridge, it is very difficult to tell whether you are going to clear it or not? A. That's correct.

(318) Q. When should he have seen that he wasn't going to clear the bridge? A. He should have seen it by coming under the Pulaski Bridge.

• • •

Q. Can you tell from what point between just under the General Pulaski Skyway and the Lincoln Highway bridge, whether a foremast of a ship is going to clear by some ten feet? Is your eye that accurate?

Mr. D'Auria: I am going to object to this further line of questioning..

• • •

The Court: Overrule the objection.

The Witness: As a qualified pilot, which Captain (319) Bassett was, who was pilot of the vessel, under the direction of the Master of the tanker, he should have known right away, the moment he cleared the Skyway bridge, that the bridge was not open. He goes up there—or he was up there almost every day.

Q. You are referring to Captain Bassett? A. Correct.
Q. Captain—

The Court: Just a minute, Mr. Julian. I am just wondering whether he got the drift of your question.

Mr. Julian: I was getting ready to do that.

The Court: What he is referring to—you correct me if I am wrong—is your previous statement, I think in answer to a question of mine, that when you are a certain distance away from the drawbridge like that, with tall masts, it is difficult to determine at a distance whether your mast is going to pass under your bridge. Is that right?

The Witness: Yes, sir, that's correct.

The Court: Not what the qualifications of Captain Bassett were, but whether or not you, in view of what you said, were you under the Pulaski Skyway, you could be able to gauge the ability of the topmast to go through.

The Witness: That's correct.

(320) The Court: Could you?

The Witness: Yes, definitely. But I would go at a safe speed.

The Court: So if your judgment proved to be incorrect, you could—

The Witness: Stop the vessel.

* * *

Q. Assume, Captain, that her full speed, harbor speed, is nine knots, and at just prior to 1546½ that engine was slowed and stopped for the first time, the order of harbor full ahead, and run that at six minutes against the tide and with the wind against it, what speed do you think the ship would build up to at the end of six minutes? A. About nine, nine and a half.

Appendix A

Q. If her maximum speed is nine, and she is against the tide, how is she going to get up to nine and a half? A. I don't know what, against the tide or not, but even if it's against the tide, she has to make a certain speed to get through the water. When the vessel was put on full ahead, she had already had the momentum which forced her through the water. It was not from the beginning, give a full ahead from the deck.

Q. You assume that when you gave that reply? A. Yes.

The Court: Do I understand what you said now, Captain, to be in effect—and you correct me if I am wrong—that when she was given this harbor speed, she already had way on her?

(322) The Witness: She already had way.

The Court: Which made her actual movement through the water—

The Witness: Exactly, she had already been going on—I think when I looked the log over—half ahead and slow ahead, which gave her the momentum already through the water. So when they put her on full ahead, it pushed her right ahead. That's the beauty of her motor engine; that the moment you ring your telegraph, she pushes right ahead.

• • •

Appendix B

Exhibit R-4 (Peschken's Report of Accident, dated December 20, 1957)

P-6 Pilot dft 12/1/59

No Electrical Damage
J Lannacone 12/27/57

Form oEL.-3
(Old oEDM-17) Ev. 5-9-60

NEW JERSEY STATE HIGHWAY DEPARTMENT
Bureau of Electrical Operations

R-4

REPORT: ACCIDENT TO MARINE TRAFFIC AT STATE HIGHWAY DRAWBRIDGE

Make two copies. Send Original to Bureau of Electrical Operations, Trenton. Keep other for own record.

Date of Accident: Dec. 20. 1957 Time: 3.54 P.M.

Name of bridge: Route: 25M M. P.: 57.6 [illegible] 9094-60

Known as (Local name): Hackensack R. Br

Detailed description of accident:

We knew that the tugs had gone up the river for the steamer and we were watching for them

When we seen them coming I signaled the gateman to close the gates and I gave the steamer a long blast on the horn. Due to electrical trouble on the bridge this was done before the steamer reached the skyway. The span was in upward motion before the steamer was under the skyway. The span continued to go up slowly but the steamer did not slow up his speed until his aft or rear mast had hit the span. The span continued in the upward direction until all boats were clear of the span. Both forward and rear masts struck the girders under the span. The forward mast struck the girders all the way through and the rear mast after striking a couple of girders cleared the rest due to the span still going up. The tugs were not attached to the steamer. Steamer was going under its own power.

Steamer and tugs continued on. No type of river traffic very windy and raining

Identification of Tugs/Boats/Craft involved:

Boat #1	Boat #2	Boat #3
Type Oil Steamer	Type Tug	Type Tug
Name Lombulus	Name Nadine Moran	Name Catherine Moran
Owner	Owner Moran Towing Co.	Owner Moran Towing Co.
Address London	Address N.Y.C.	Address N.Y.C
Captain	Captain	Captain
Address	Address	Address
Employees	Employees	Employees

REC'D
Dept. of Law & Public Safety
DEC 30 1957
LAW DIVISION

Arrived at 1744 / 20th (Stapleton Tugs) Sailed 2010 / 23rd.

Pratique Granted

Was protest noted, if so, record when and where

Gave notice of readiness to load Time Date to discharge Time Date

Grade(s) of cargo Tons

Ship berthed ~~Port Side~~ Starboard Side ~~Name~~ Stern on to Wharf, or Number Pier 11 Time Date
Station 9s. Berth = Steel Repair Yard.

Steam supplied from shore hours minutes

Steam supplied by ship hours minutes

On arrival clock put forward / back hours minutes from sea time to shore time

On departure clock put forward / back hours minutes, from shore time to sea time

Particulars in the Port Sheet are to be filled in under the appropriate heading when applicable. Where no data are available in respect of an entry, an explanation must be given.

REMARKS.

Insert in chronological order details relating to shifting berth, working cargo, valves, lines and tanks used, etc., delays and information regarding damage to ship or cargo. Whilst not trading, particulars of docking, tank cleaning, repairs, etc., to be inserted.

Friday 20th December.

1529 All clear fore and aft, dead slow ahead, proceeding Seawards. 1537 ½ Swinging in river 1542½ ½ Swung, slow ahead proceeding downriver 1543½ Lackawanna bridge opened. 1546 Dead slow ahead, ½ ahead Lackawanna Bridge. 1555 Dead slow ahead, Stop. 1556 Full astern. 1557 Emergency full astern, fore and main topmasts struck Lincoln Highway Bridge span — see Casualty Report. 1601 Full ahead 1616 Approaching Lehigh Valley Br 1616½ Passed under Br. 1651 Changed Pilot 1754 Approaching Bayonne Br. 1734 Stop approaching Stage

J Starling Chief Officer.

Signed [illegible] Master.

p.3

K-7

ACCIDENT TO MARINE TRAFFIC AT STATE HIGHWAY DRAWBRIDGE

Make two copies. Send Original to Bureau of Electrical Operations, Trenton. Keep other for own record.

Date of Accident	Dec. 20. 1957	Time	3.54 P.M.
Name of bridge: Route	35M	M. P.	57.6 [illegible]
Known as (Local name)	Hackensack R. Br		

9094-60

Detailed description of accident:

We knew that the tugs had gone up the river for the steamer and we were watching for them

When we seen them coming I signaled the gateman to close the gates and I gave the steamer a long blast on the horn. Due to electrical trouble on the bridge this was done before the steamer reached the skyway. The span was in upward motion before the steamer was under the skyway. The span continued to go up slowly but the steamer did not slow up his speed until his 2nd or rear mast had hit the span. The span continued in the upward direction until all boats were clear of the span. Both forward and rear masts struck the girders under the span. The forward mast struck the girders all the way through and the rear mast after striking a couple of girders cleared the rest due to the span still going up. The tugs were not attached to the steamer. Steamer was going under its own power.

Steamer and tugs continued on. No type of river traffic very windy and raining

Identification of Tugs/Boats/Craft involved:

Boat #1	Boat #2	Boat #3
Type Oil Steamer	Type Tug	Type Tug
Name Lombulus	Name Audine Moran	Name Catherine Moran
Owner	Owner Moran Towing Co.	Owner Moran Towing Co.
Address London	Address N.Y.C.	Address N.Y.C
Captain	Captain	Captain
Address	Address	Address
Employees	Employees	Employees
Speed	Speed	Speed
Direction South	Direction South	Direction South
Loaded ✓ Empty	Loaded Empty	Loaded Empty

REC. Dept. of Law & Public Safety DEC 30 1957 LAW DIVISION CLAIMS BUREAU TRENTON, N. J.

Signals given by boat/s:

1	3 Blast of horn	2		3	

Signals given by bridge: 2 Blast of horn

Time bridge was clear for marine traffic: ____ A.M. / P.M.

Direction of tide: ✓ Incoming ____ Outgoing

Direction of wind: ✓ N ____ S ____ E ✓ W

Type of damage to Tugs/Boats/Craft:

Boat #1	Boat #2	Boat #3
Forward mast Broken Rear mast Bent.	None	None

RECEIVED
ELECTRICAL BUREAU
DEC 23 1957
STATE HIGHWAY DEPT
TRENTON, N. J.

Detailed description of all damage to bridge or other state property:

None that I can see

Statement of condition of damaged portion of bridge or other state property immediately before accident:

Date of this report: Dec. 20. 1957

Signature of person reporting: Mark Gilbert

Time bridge was clear for marine traffic: [ ] A.M. / P.M.

Direction of tide: [✓] Incoming [ ] Outgoing

Direction of wind: [✓] N [ ] S [ ] E [✓] W

Type of damage to Tugs/Boats/Craft:

Boat #1	Boat #2	Boat #3
Forward mast Broken Rear mast Bent	None	None

RECEIVED
ELECTRICAL BUREAU
DEC 23 1957
STATE HIGHWAY DEPT
TRENTON, N. J.

Detailed description of all damage to bridge or other state property:

None that I can see

Statement of condition of damaged portion of bridge or other state property immediately before accident:

Date of this report: Dec. 20. 1957

Signature of person reporting: Charles Tucker

Title of person reporting: Chief Bridge Operator

R4(2)

Appendix C

Letter of April 21, 1960 from Board of Commissioners of Pilotage, State of New Jersey, Annexed to Peschken's Motion After the Trial Court's Decision

Board of Commissioners
of Pilotage
Room 4200
40 Wall Street
New York 5, New York

April 21, 1960

Alfred P. D'Auria, Esq.
Deputy Attorney General
State of New Jersey Department of
Law and Public Safety
State House Annex
Trenton 25, New Jersey

Re: Collision—S.S. LEMBULUS—Highway Bridge

Dear Mr. D'Auria:

With further reference to the above matter, available information indicates that there was slack water in the Hackensack River at the time of the collision. This information is taken from the "Tide Current Charts," New York Harbor, 7th Edition, published in 1951 by the United States Geodetic Survey.

The collision occurred at approximately 1 hour and 45 minutes after low water. The tables indicate that 1 hour after low water there would be a .2 knot ebb tide, and 2 hours after low water there would be a .1 flood tide.

I hope this information will be helpful.

Very truly yours,

STATE OF NEW JERSEY
BOARD OF COMMISSIONERS OF PILOTAGE
WALTER E. MALONEY
Secretary

Appendix C

Letter of August 23, 1960 from U. S. Department of Commerce, Annexed to Peschken's Motion After the Trial Court's Decision

U. S. DEPARTMENT OF COMMERCE
COAST AND GEODETIC SURVEY
90 Church Street
New York 7, N. Y.

23 August 1960

Mr. Theodore I. Botter
Deputy Attorney General
State of New Jersey
Department of Law and Public Safety
State House Annex
Trenton 25, N. J.

Dear Sir:

This is in reply to your letter of August 22, 1960 requesting information concerning the height of tide and the strength of the tidal current at Lincoln Highway Bridge across the Hackensack River on December 20, 1957 at 3:57 P.M.

On December 20, 1957 the tides at the Battery, New York City were as follows:

	Predicted		*Observed*		*Difference Observed*
	Time	*Height*	*Time*	*Height*	*Pred.*
High Water	7:23 AM	5.3 ft.	7:54 AM	5.8 ft.	+0.5 ft.
Low Water	1:49 PM	—0.9 ft.	2:06 PM	0.0 ft.	+0.9 ft.
High Water	7:50 PM	4.2 ft.	8:00 PM	5.3 ft.	+1.1 ft.

Appendix C

The tide at Port Newark Terminal occurs 10 minutes later and the high water is 0.6 foot higher than at the Battery, if not influenced by non-tidal forces, such as wind. The above tide information is taken from Tide Tables, East Coast of North and South America, 1957, and from copies of the automatic tide gage records for the Battery furnished by our Washington Office. Height of tide is above mean low water which is 0.0 feet. Times are Eastern Standard.

Our Current Tables, Atlantic Coast, North America, 1957 list the following predicted current information for December 20, 1957.

The Narrows

	Time	*Velocity*
Maximum Ebb	12:05 PM	2.3 knots
Slack Flood begins	03:48 PM	0.0 knots
Maximum Flood	06:20 PM	1.7 knots

For Lincoln Highway Bridge, north of, the table states that the currents are 10 minutes later and have a velocity ratio of 0.5 as referenced to the Narrows. According to the predicted times slack water at the bridge was at 3:58 PM on December 20, 1957.

The above information is true according to the best of my information, knowledge and belief.

/s/ G. R. Fish
G. R. Fish
District Officer
New York District

PORT SHEET of the M/S. Lewisburn at Staten Is. Repair berth. from 20 XII 57 to 23. XII. 57

{ to commence when ship is berthed or at anchorage in port and to terminate at departure from berth or anchorage. } To be kept in local time, 0 to 24 hours.

Arrived at 1744 / 20th (Stapleton Stage) Sailed 2010 / 23rd.

Pratique Granted

Was protest noted, if so, record when and where

Gave notice of readiness to load Time Date to discharge Time Date

Grade(s) of cargo Tons

Ship berthed ~~Port Side~~ Starboard Side / ~~Stern on~~ to Wharf, or ~~Name~~ Number Pier 11 Time Date
Staten Is. Berth = Steel Repair Yard.

Steam supplied from shore hours minutes

Steam supplied by ship hours minutes

On arrival clock put forward / back hours minutes from sea time to shore time

On departure clock put forward / back hours minutes from shore time to sea time

Particulars in the Port Sheet are to be filled in under the appropriate heading when applicable. Where no data are available in respect of an entry, an explanation must be given.

REMARKS.

Insert in chronological order details relating to shifting berth, working cargo, valves, lines and tanks used, etc., delays and information regarding damage to ship or cargo. Whilst not trading, particulars of docking, tank cleaning, repairs, etc., to be inserted.

Friday 20th December.

1529 All clear fore and aft, dead slow ahead, proceeding Seawards. 1537 ½ Swinging in river 1542½ ½ Swing, slow ahead proceeding downriver. 1543½ Lackawanna bridge opened. 1546 Dead slow ahead, ½ ahead Lackawanna Bridge 1555 Dead slow ahead, Stop. 1556 Full astern. 1557 Emergency Full astern, fore and main topmasts struck Lincoln Highway Bridge span — see casualty Report. 1601 Full ahead 1616 Approaching Lehigh Valley Br 1616½ Passed under Br. 1651 Changed Pilots
H. S. L. [illegible]

Appendix E

Excerpts from Transcript of Argument on Respondent Peschken's Motion for Judgment, Notwithstanding Findings of Fact and Conclusions of Law (September 26, 1960)

Newark, New Jersey,
September 26, 1960.

Before:

Honorable REYNIER J. WORTENDYKE, JR.,
U. S. D. J.

Appearances:

MESSRS. MCCARTER & ENGLISH,
Attorneys for Libellant,
By: FRANCIS E. McCARTER, ESQ.

DAVID D. FURMAN, ESQ.,
Attorney for Respondent,
By: THEODORE I. BOTTER, ESQ.

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(2)* Mr. Botter: We have the twin motions in the Shell Petroleum vs. Peschken.

The Court: You want me to reconsider my opinion?

Mr. Botter: Yes, your Honor.

The Court: How shortly can you present the essence of your brief?

Mr. Botter: I'll try to be brief. I know the Court has had a long day.

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* All figures in parentheses indicate the number of each new page of the stenographic transcript.

Appendix E

The Court: Don't worry about me. I will tell you what I wish you would do first. I wish you would demonstrate that mathematically I couldn't be right. That is the substance of what you say in your brief.

Mr. Botter: Well, yes, we think that there is error in the mathematics. One of the items—

The Court: Can you simplify that for me?

Mr. Botter: Yes. Well, I'll first deal with the portion of the evidence as relates, I'the mathematics, which is not of the evidence as relates to the easiest aspect to deal with contradicted. That will be th
first. say this: I am not concerned

The Court: Let me just sen I wrote the opnion, whether now, nor was I concerned whethe first draw or whether it this vessel backed through tfar as the movement at that came nose first, except insofad the timing of its (3) arrival stage bore upon the speed and
at certain critical points. that essentially we agree that

Mr. Botter: I'd like to say tpend too much upon the turn- the ultimate speed did not dep Lackawanna bridge and the ing of the vessel between the of the vessel north of Lack- City bridge, or the turning o it would have a little more awanna bridge, except that it ahead. If it had first been headway if it started going anna bridge, by the time we turned north of the Lackawald have already had a little went into full ahead it would had first been turned around more headway on it than if it lna bridge and then started after passing the LackawannBut the strong contradiction from a dead stop position. BCaptain Hawkins' testimony of the Master's testimony, Cned around—
on the point where it was turns credibility.

The Court: That affects his whole truthworthiness of the

Mr. Botter: Yes, and the w your Honor. The uncontra- reliability of his testimony, yas relates to the speed of the dicted phase of the evidence as

vessel concerns the last stage of this trip from the point that the vessel was marked D on this Exhibit P-2 in evidence, which was just north of the Pulaski Skyway to the point where it came in contact with the bridge. Now, this point was clearly identified by Captain Hawkins. It was he who placed the vessel here, and this is significant, (4) that the location of the vessel is with respect to a fixed object, it wasn't necessary to take bearings for the Captain to know that he was just north of the Pulaski Skyway.

Now, there is no other testimony in the record that bears upon the location and time just north of the Pulaski Skyway and the time when the collision took place, no other testimony. The Captain said that at 15:53 and a half he was at point D, and several time in the record he said it was there that he gave his signal to the bridge for the opening of the bridge.

The Court: What was that, about a half mile north of the bridge?

Mr. Botter: Yes, your Honor. It is approximately point 53 miles north of the Lincoln Highway bridge. There were two figures used for the same period of time. It was only three and a half minutes between the point just north of the Pulaski bridge and the time of the collision.

The Court: The collision was 15:57, wasn't it?

Mr. Botter: 15:57.

The Court: And this point at the Pulaski Skyway was 53.

Mr. Botter: Yes, your Honor. Now, the Captain himself admitted that going this distance .53 miles in three and a half minutes, he would have to do (5) and was doing nine knots on the average. Now, there is no other testimony in the case that tells us how fast the vessel was going between the Pulaski bridge and the Lincoln highway bridge.

The Court: Nine knots.

Mr. Botter: For the three and a half minute period to cover a distance of .53 miles. There was a recalculation made after a recess, and it was based upon the fact that the vessel may have been approximately 400 feet north of the Pulaski Skyway, and that would add a little more distance to this portion of the trip and would make it approximately .6 of a mile, and for the three and a half minutes to do that distance, the later calculation was 10.2 knots.

The Court: Instead of 9.

Mr. Botter: Yes. Now, Captain Hawkins admitted both of those speeds and calculated those speeds, and it was he who fixed the time and place. Now, to attain the speed of something between 9 and 10.2 knots we know from other testimony in the case the vessel would have to be going for a considerable period of time at its full harbor speed, and that too was testified by the Captain. Captain Hawkins said that for a period of six or six and a half minutes, from 15.46 and a half to 15.53 and a half his (6) vessel, which was lightly laden, it was in ballast, but had no cargo, was going at full ahead. He admitted that full ahead was harbor speed was nine knots, full ahead in the open ocean was 10¾ to 11 knots, and after making this calculation in this distance between the Pulaski Skyway and the Lincoln Highway bridge, the Captain admitted yes, he was going almost at full ocean speed.

We say, your Honor, that that evidence alone, without more, without the other evidence that we feel further augments our position in this case, the Master, the pilot, the operators of the vessel were negligent. They were going at a high speed.

Now, in considering the speed that the vessel was doing shortly before it struck the bridge, your Honor calculated the speed with reference to the City bridge point. There

we run into contradictions. It is true, we feel, that the overwhelming weight of evidence puts the vessel at the Lackawanna bridge at 15:46, therefore, the vessel had to make a longer distance to the Pulaski Skyway in the same period of time that the Captain said he was only going from the City bridge to the Pulaski Skyway. * * *

On that evidence alone, your Honor, we submit there is proof of excessive speed because of his important point: It is true that the engine movements between the Pulaski Skyway and the Lincoln Highway showed that the engine was not going at full ahead, it was taken off full ahead. It was dropped into half ahead, in slow and stop and things of that sort. But here is a vessel that had gotten up to full speed, had been going at full speed for a long period of time. As the testimony of both Captain Hawkins and our own expert, Captain Kuhn showed, the momentum of the vessel would be enough to maintain that speed. You don't take much away from the vessel simply by cutting the engine (8) down. Therefore, it is not of much purpose to debate the starting point and the average speed throughout the whole distance.

The clear uncontracted testimony between the point of the Pulaski Skyway and the Lincoln Highway bridge shows an excessive, grossly excessive speed. This is a narrow winding channel. It doesn't take an expert to know that a vessel does not go at close to its maximum ocean speed in a channel of this kind.

The Court: What do you mean by that statement? You mean I must assume that it didn't go at its maximum speed?

Mr. Botter: No. I mean that a layman would know that a vessel should not be driven at its maximum ocean speeds.

* * *

Appendix E

Mr. Botter: Now, if nothing else was in the case, the vessel was negligent based upon its own testimony as to its speed. Moreover, Captain Hawkins himself admitted that 3.3, or 3.5 knots was sufficient to maintain steerage way in in this channel. At first he said four or five, but then after various calculations he admitted he was at one time going three to three and a half knots, and that that was sufficient to maintain steerage way under these conditions.

Now, there is a point in your Honor's opinion that bothers us with respect to your Honor's statement relating the speeds to ground speed. All the testimony in this case your Honor related to effective speed of the vessel simply by mathematical computation, time, distance or time times 60 to get the knots.

• • •

The Court: In other words, you say I should have accepted the testimony of the witness as pertained to the rate of speed under existing conditions?

Mr. Botter: Yes. Moreover, you should not (12) have diminished from the excessive speed that we charge because of an unknown factor of the tide. Even if there was an incoming tide, let us say somewhere between slack tide and flood tide, there is no evidence to show that the tide was of any particular speed. That is to say, maximum tide in this river may have been only one or one and a half knots, which would not have been appreciable to diminish the effective speed of that vessel.

The Court: You say there is no evidence on it?

Mr. Botter: No, no one said how fast the tide was going, if it was actually coming in. For that reason and we notice your Honor had taken judicial notice of one of the maps of the U. S. Coastal Geodetic Survey, and we ask your Honor even at this time, and if this be considered for this limited purpose or request, to reopen the case to put

this evidence in since we feel it is uncontradicted and comes from a source which the Court can take judicial notice. We would like to have the Court notice that this was indeed a time of slack water and that the tide, if there was an incoming tide at all, and it would be a tide incoming by maybe ten minutes at the time of the turn of the tide, the speed of the tide was absolutely negligible at this time. Our expert so testified.

Now, we have letters which we have annexed to (13) our moving papers to show the Coastal Geodetic Survey chart with respect to the tide.

The Court: That wasn't before me at the time I wrote the opinion.

Mr. Botter: It was not, your Honor. We didn't think that the tide was that much of a factor, frankly. No one made mention of the tide as a significant factor in considering the speed of this vessel.

The Court: I have never felt the tide on the Hackensack River. I have on other rivers in New England. Of course, the tide rises and falls there at a much greater distance than it does here around metropolitan New York. But I have no right to assume one way or the other with respect to the effective tide on the speed of a vessel in ballast and of the dimensions of this one, unless I have evidence.

Mr. Botter: I would like to point out one thing further. The letters that we referred to, that we included in our moving papers, compute the various tides at different points. I think one of the points is the Port Newark Terminal. Now, on P-1, I believe, this very large map that is rolled up—

The Court: What is that, a chart?

Mr. Botter: Yes, this is the chart, Coastal (14) Geodetic Chart of the Hackensack bridges, P-1 in evidence. There is a notation here with regard to soundings in feet at mean, low water, and it shows virtually no change in low and

high water points between Port Newark and Little Ferry in the Hackensack River, which would be in the extreme north. So that for all intents and purposes we feel that the tide conditions at Port Newark—

The Court: Were the same.

Mr. Botter: With reference to these notations on this chart would be the same as at the bridge, yes. In any case, you could not have flood tide at this bridge regardless of wind conditions. Flood tide was four and a half to five hours away, your Honor. Captain Hawkins was clearly wrong—I won't say he was intentionally wrong—when he said it was flood tide, but he himself did not attribute much significance to the tide in his testimony.

• • •

The Court: Before you move to that, the nub of your contention is that the vessel between the Pulaski Skyway and the Lincoln highway bridge was traveling too fast?

Mr. Botter: Too fast based upon the only testimony in the case, because it was Captain Hawkins who placed the vessel at the Pulaski Skyway and gave the time of that position. He did so several times in his testimony. This was not an accidental point in his testimony, your Honor.

The Court: You want to object to some of his testimony and accept the rest.

Mr. Botter: Well, your Honor, I tell you our position on that. Let us assume that there is conflict in the testimony between his turning below the Lackawanna bridge or north of it, and also conflict with regard to his passing the Lackawanna bridge at 15:46 or passing the City bridge at 15:46. We feel that consistent with his testimony relating to the distance and time for the trip between the Pulaski Skyway and the Lincoln Highway we can take the

overwhelming weight of evidence in the case and fix his beginning point at the Lackawanna Bridge at 15:46. In (16) other words, if he passed the Lackawanna bridge at 15:46, the time and speeds attained from this point to the Pulaski Skyway are consistent in the evidence, the Bridge Movement Book, the deck log book and the engine movement books can explain the trip of the vessel consistently in this period. However, if you take Captain Hawkins testimony and start him with the vessel at 15:46 on the City bridge, you run into problems of getting up to a high rate of speed at this point, Pulaski Skyway, when he is only doing an average, let us say, of about three knots in the point between the City bridge and the Pulaski bridge.

In other words—

The Court: In other words, the speed does not become critical until he reaches the point of the Pulaski Skyway.

Mr. Botter: That's right. Now, we say that his testimony that is to be disregarded is important in terms of his veracity, reliability, his ability to remember, to put together these different facets of the case. We don't say disregard it because it hurts our case; we say disregard it because, first of all, it is contradicted by the overwhelming weight of credible evidence by impartial witnesses, by log, by books of the various bridge operators, you see, and contradicted by his own testimony, by his vessel's own (17) records. The bridge movement book and the deck log clearly show his position at the Lackawanna bridge at 15:46.

Now, he hit the City bridge at a later time. We asked on cross-examination if the deck log book was made up at night from excerpts from the bridge movement book, and why did you call this bridge the Lackawanna bridge when you say you had already made the notation in the

bridge movement book that it was the City bridge. Counsel interrupted—his own counsel interrupted and said, "If you know." His answer was, "I don't know." He couldn't explain that, your Honor. We feel it is not usual for an ink notation to be made in the bridge movement book, that's the only ink notation in that book, and when he came to explain why he called it the Lackawanna bridge, when a copy was later made of the bridge movement book when he claims he had already made the entry of City bridge in that bridge movement book, he couldn't explain it.

The Court: He couldn't reconcile the inked in City bridge with the Lackawanna bridge which he previously made.

Mr. Botter: Yes. The bridge movement book is made simultaneously with the events. This book is all in pencil and made by the—one of the officers on the bridge. It says right at the front of it, it must be (18) made "contemporaneously recorded in a neat and orderly manner." There is only one ink notation in this book for the day in question, and that is when he places a 15:46 the vessel at the City bridge, and he does it in the lefthand margin. He has his initials there. We don't have many opportunities, your Honor, to test the credibility of a witness. It doesn't change his speed between the Pulaski Skyway bridge and the Lincoln Highway bridge, but here is a witness who comes in with records, all sorts of letters and records, and he says we didn't know what bridge it was. Why did you put City bridge in? He said, "I asked the pilot." You will notice in one of his records the pilot, who is piloting that vessel, left at approximately 16:00 hours, left the vessel. So that some time that day he says he asked the pilot, and I would say between 15:57. I'll give you the page reference, page 9, at 16:51.

The Court: What is this, the deck log?

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Mr. Botter: This is the deck log. On page 9, "16:51 changed pilots." That is the pilot Bassett who left, and then the pilot who came on was our witness.

The Court: Then you say that that entry in the bridge movement book, opposite which there has been the ink insertion, in ink of "City bridge," should read "Lackawanna bridge"?

(19) Mr. Botter: That's right, because in the bridge movement book made up that night from the Captain's own testimony, it was made up by taking excerpts from the bridge movement book, clearly states 15:43½, Lackawanna bridge open, 15:46 dead slow ahead, vessel cleared Lackawanna bridge. There it is, 15:46 cleared bridge. There is another part of proof that this was the only bridge they passed. The Lackawanna bridge was the one they passed at 15:46 in this bridge movement book. You will notice at page 67 that this is the first bridge noted in the bridge movement book that the vessel had approached and cleared. Now, the first bridge we know is the Lackawanna bridge. We also know that from [illegible]:29 to 15:37 the vessel, with the assistance of the tugs, was being maneuvered away from the dock. At 15:37 the vessel was swinging in the river. At that notation, 15:37, continuous swinging around in river. At 15:38 engine movement is stopped. At 15:40 vessel turned in channel. 15:41 stopped, 42½ slow ahead; vessel approaching bridge. 15:43½, slow ahead, bridge opened.

The Court: That is the Lackawanna?

Mr. Botter: That is the Lackawanna, the first bridge they encountered after they swung the vessel.

The Court: Does not that Lackawanna bridge (20) tender's log agree?

Mr. Botter: It agrees identically. It is amazing that the two clocks were synchronized. But possibly not amaz-

ing, railroad trains may not arrive on time, but I think clocks usually are accurate. But the time of the bridge movement book and the Lackawanna tender's book coincides, and amazingly again, that time also coincides with the records of the City bridge that were produced.

The Court: Were they produced?

Mr. Botter: Yes, they were, your Honor.

The Court: I didn't recall the City bridge tender's—

Mr. Botter: As a matter of fact, that is another point in which we feel there was an error in the Court's opinion. Your Honor mentioned in your opinion that it was our own bridge book that said the vessel came through between 15:42 and 15:48. But our own bridge book was not put in evidence. It was the bridge book of the City bridge that was put in evidence.

I have to clarify one point. We have throughout this case referred to the City bridge as a composite. It is actually three bridges. In other words, the New Jersey Highway bridge, which is northernmost the Pennsylvania Railroad bridge, and the Pennsylvania Railroad passenger bridge, those three have been referred to for simplification (21) as the City bridge. It was the log of one of these railroad bridges that was introduced and showed the vessel going through between those periods of time. It was not our own log.

The Court: Was that log put in evidence?

Mr. Botter: I believe it was.

The Court: Have you it there?

Mr. Botter: R-2 shows, among other things, December, 1957, the 20th of December, it says, "Lembulus tanker 3-42, 3-48."

The Court: That is Respondent's Exhibit 2?

Mr. Botter: R-2. I believe—I am sorry, I believe R-2 is the Lackawanna bridge record.

The Court: You say your recollection is that it is in evidence, the City bridge log book?

Mr. Botter: It is the Pennsylvania, sir.

The Court: Is that one of the City bridges?

Mr. D'Auria: That is alongside of the City bridge where the three bridges are together. One is the City bridge, which we call the Whipen bridge. Right after that are these two City bridges.

The Court: Pennsylvania?

Mr. Botter: R-2, as shown on page 223 of the testimony, is the log of the Lackawanna bridge. It (22) shows between 3-42 and 3-48. There was testimony—

The Court: I will review the matter. Suppose you go to your legal—

Mr. Botter: There was testimony as to the vessel clearing this bridge. I have it in my brief. I know the bridge was closed at 15:51. I remarked that that was approximately three minutes after the Lackawanna bridge was closed, and that—

The Court: 15:51 the Pennsylvania bridge was closed?

Mr. Botter: Yes, your Honor. The Lackawanna bridge was closed at 15:48. I recall in the brief noting that the times were consistent, because there was a three-minute interval for the vessel to pass that distance. But I also point out if the vessel were turned south of the Lackawanna bridge, and it took five minutes according to the engine log book and the bridge movement book, to turn the vessel, it could not have cleared this Lackawanna bridge at 15:46 and then spend five minutes in turning in the river, then starting out from dead stop position and pass the City bridge at 15:51.

The Court: *I am satisfied she turned about above, north of the Lackawanna bridge.* (Emphasis added.)

Mr. Botter: There were about eight people who (23) so testified.

I'd like to turn to the crucial point of law upon which you Honor decided the case.

* * *

Appendix E

Mr. Botter: Your Honor stated that the bridge tender was negligent in commencing to open the bridge after giving the warning signal. You felt that that countermanded the warning signal.

The Court: In effect that invited them to come ahead despite the warning.

Mr. Botter: In the first place there are no cases that we have found, and we submit none cited by your Honor, to support that proposition of law. There were two cases mentioned by way of reference with a "See" reference to the cases, the Kard and the Clement cases. In both of those cases liability was founded on the failure of the bridge tender to give any warning signal. It was not that the warning signal, plus the opening of the bridge, resulted in an invitation to come on; in those cases it was the failure to give any warning to the vessel to hold off, or any warning of possible delay which permitted the vessel to proceed through. The vessels in both cases gave the appropriate approaching signals.

• • •

The Court: There were two warning signals given from the bridge?

Mr. Botter: Yes, your Honor. But the crux of our case legally is this—and, incidentally, no one testified on behalf of the vessel to deny in any way the receipt of the warning signals, they simply said they got an answering signal, didn't bother denying that they were warning signals—

The Court: I remember that the vessel admitted it heard a blast from the bridge.

Mr. Botter: Now, we feel that the regulations are clear on the subject, that once—and the case law—a warning is given to the vessel the bridge cannot move out (25) of the way of the vessel. This bridge tender could not have

done anything further but warned this vessel, and once the warning is given to the vessel we feel that the obligation is on the vessel, in the little that I know about navigation and the rules of the road, or rules of the sea, the vessel becomes the burdened vessel. It has the obligation to hold itself off. The very case cited by your Honor in your Honor's opinion states that, that the vessel has the right to come on. It is true that it was the paramount right in navigating the river. We have to open our bridge, if we can do so. But the regulation contemplates that we might have delay, we might have obstructions and we might have mechanical difficulties. In those events our obligation is to give a warning signal. That was concededly done in this case. From that point on the vessel was at its peril in coming on, and particularly in this case in coming on at its great speed.

* * *

Mr. McCarter: * * *

Well, let us return now to the transcript, to the testimony of respondent, and the records contemporaneously made with the accident. I am forced to concede that Captain Hawkins' testimony left something to be desired by way of clarity.

* * *

IN THE

Supreme Court of the United States

October Term, 1961

No. 331

THE SHELL PETROLEUM CO., LTD., as owner of the
M/S LEMBELUS, *Petitioner*,

against

CHARLES PESCHKEN, *Respondent*,

and

CAROLUS V. HINES and FRED W. BENTS

MOTION AND BRIEF OF THE AMERICAN WATERWAYS OPERATORS, INC. AS AMICUS CURIAE

JOHN H. ELLIOTT, JR.
Counsel for The American
Waterways Operators, Inc.
Suite 338
1625 Eye St., N. W.
Washington 6, D. C.

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IN THE

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and

CANOLIUS V. HINES and FRED W. BENTS

MOTION FOR LEAVE TO FILE A BRIEF AS AMICUS CURIAE

TO THE HONORABLE, THE CHIEF JUSTICE OF THE UNITED STATES AND THE ASSOCIATES JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

The American Waterways Operators, Inc., respectfully moves this Honorable Court for leave to file the accompanying brief as *Amicus Curiae*. The consent of the petitioner has been obtained but the respondent has refused to consent to the filing of a brief by The American Waterways Operators, Inc. as *Amicus Curiae*.

Movant, The American Waterways Operators, Inc. (hereinafter called A.W.O.) has an interest in this case in that it acts as an agent through delegated authority from its membership. A.W.O. members operate vessels on navigable waterways throughout the United States. Some or all of these members are directly or indirectly confronted with the issues raised in this case as presented by petitioner, The Shell Petroleum Co., Ltd., as owner of the m/s LEMBULUS. Stated otherwise, the issues as thus presented are *not* confined solely to the interest of the above-mentioned petitioner, but are National in scope. In view of the posture of the law on this subject, the grant of certiorari is urgently requested due to the impact the decision of the Court of Appeals in the instant case will have on a National basis if permitted to stand.

Review of the case at hand is necessary due to the lack of a clear and definite statement of the law on the subject at issue, as a result of the confusion created by the decision of the Court of Appeals in the Third Circuit in this case. The duties and liabilities of the operators of bridges spanning heavily navigated waters throughout the United States is now a matter of complete confusion. Further, it appears from the testimony in petitioner's case that many bridge operators have come to understand that they may avoid liability for damage to passing vessels by refusing to give a "come ahead" or "all clear" signal to vessels signalling for passage notwithstanding the bridge may already be opening or may already be completely open. Such a practice is a perversion of signalling regulations duly established by federal authorities for the preservation of life and protection of property.

Most important, there is a lack of operational uniformity among bridge tenders located in the territory covered by the several Circuits, despite the fact that the same vessl on the same voyage may and frequently does pass under numerous bridges located in the several Circuits.

The decision of the Third Circuit Court of Appeals in petitioner's case precipitated this perversion and must be countermanded by this Court.

WHEREFORE, The American Waterways Operators, Inc. moves this Honorable Court for leave to file the attached brief as *Amicus Curiae.*

Respectfully submitted,

JOHN H. EISENHART, JR.
Counsel for The American Waterways Operators, Inc.
Suite 318
1025 Conn. Ave., N. W.
Washington 6, D. C.

Washington, D. C.

September 25, 1961

BRIEF OF THE AMERICAN WATERWAYS OPERATORS, INC. AS AMICUS CURIAE

INTEREST OF AMERICAN WATERWAYS OPERATORS, INC.

The basic facts and questions presented in the instant case have been covered in substantial part by the petition for writ of certiorari filed on behalf of The Shell Petroleum Company, Ltd. To the extent that this is so, they will not be repeated here. There are other facets to the case, however, which The American Waterways Operators, Inc., (hereinafter called A.W.O.) as *Amicus Curiae* feels necessary to submit to this Honorable Court.

A.W.O. is the national association that represents small vessel operators throughout the entire United States. Through A.W.O., these operators present their cases to governmental agencies, State and Federal Courts in matters which are industry-wide in interest, and in this instance to this Honorable Court. The primary reason for this is to conserve time and expense of all involved and permit the judicial tribunal before which the matter is presented to receive the position of the industry in one simple, unadulterated document. It is respectfully submitted that although in the first instance the matter here in issue appears to be merely a contest between petitioner and respondent, in the final analysis it is a matter of National importance and the action this Honorable Court takes with respect to the matter will have a far reaching impact on the Nation, and on this industry whose members consist of some two hundred odd operators of vessels navigating throughout practically all inland rivers, the Great Lakes, the Gulf Intracoastal Canal, the Atlantic Intracoastal Canal, bays, sounds and harbors on all coasts and on the Columbia River system on the West Coast. From time immemorial and despite technological advances, transportation by water has been considered a business which involves more than the average business risk and,

cognizant of this fact, State and Federal governments have enacted numerous special laws affecting the industry. Categorically speaking, the subject of navigation is one of International import.

CONFLICT OF COURT DECISIONS

The instant case is on appeal from the Third Circuit. A reading of the petition for writ of certiorari shows clearly that the decision of the Court of Appeals is contrary to the doctrine of *The Pennsylvania*, 86 U.S. 125; *Merrill Chapman & Scott Corporation* v. *Cornell Steamship Co.*, 265 F. 2d 537 (1959) (2d Circuit); *The Fort Fetterman* v. *South Carolina State Highway Department*, 261 F. 2d 563 (1959) (4th Circuit); *The Majestic*, 80 F. 2d 879 (4th Circuit); *Circle Line Sightseeing Yachts* v. *City of New York*, 283 F. 2d 811 (2d Circuit); *Munroe* v. *City of Chicago*, 194 Fed. 936 (7th Circuit) cert. denied, 229 U.S. 609; *Clement* v. *Metropolitan West Side El. R. Co.*, 123 Fed. 271 (7th Circuit), all cited by Petitioner.

Further, the opinion of the District Court in this case set forth beginning at page 26, Appendix A of the above-mentioned petition, points out other cases in the Sixth Circuit and in the Seventh Circuit clearly establishing that a controversy exists between the opinion of the Court of Appeals in the instant case in the Third Circuit and opinions in other Circuits. It is respectfully submitted that this confusion must be resolved by this Honorable Court.

In addition to the cases cited hereinabove, from petitioner's brief and the decision of the lower Court clearly establishing the conflict created by the decision of the Circuit Court in the 3rd Circuit, an additional conflicting decision is to be found in the 9th Circuit, namely *The Eureka* 80 F. 2d 303.

An examination of the map of the United States, with particular reference to the navigable waterways and the

existence of hazardous conditions brought about by the erection of bridges and other similar structures built for the convenience of individuals or groups of individuals, will show that in the Second, Fourth, Sixth, Seventh and Ninth Circuits, vessel operating conditions are difficult. In the application of Federal Navigation Laws, uniformity under the law is most essential to the National well-being and National Defense. Therefore, the decision of the Court in the Third Circuit must be reviewed and reversed by this, the highest Court of our land.

Further, it is obvious from a reading of the pleadings in this case that confusion exists between Federal and State regulations, particularly with reference to requirements as to audible signals between vessels and bridge tenders. In many instances practice or indifference by bridge tenders as established by competent evidence in several cases modifies not only State but Federal regulations. Navigation throughout the United States cannot be conducted without standardization of the law on this point. Such standardization could be brought about by this Honorable Court.

It is submitted that the Court may take judicial notice of several facts. For example in the Chicago area, along the Illinois River and the Chicago River, waterways are literally covered with bridges and these waterways are perhaps the most highly travelled in the world. The unimpeded movement of water traffic in this area alone is necessary for the National economy. The same can be said for other Nationally strategic areas—New York (second circuit), Tennessee River (sixth circuit), West Coast (ninth circuit), New Orleans (fifth circuit).

The need for uniform, clear navigation rules, not modified by indifference or custom of bridge tenders or any other similar employee, is absolute. This Honorable Court should not permit any lack of uniformity on this matter to continue.

In passing it should be mentioned that on July 7, 1961, the same bridge which is involved in the instant case caused a similar accident. The same agent was involved and one of our busiest waterways found its usefulness again impaired because this same bridge tender did not respond with any audible signal to the vessel "PLATIDIA" seeking passage. In this instance it appears that some eight or ten minutes elapsed before the bridge began to rise after the signals given by the "PLATIDIA" and that the bridge tender gave no signal even though he could see that navigating conditions at that time were difficult, if not dangerous.

NATIONAL DEFENSE

That our national welfare depends upon the granting of the instant petition can clearly be shown by a brief reference to a recent unfortunate accident which occurred upon a most important navigable waterway.

On or about July, 1961 the "Wheeler Dam" on the Tennessee River collapsed. Navigation between the upper and lower part of the river was therefore brought to a standstill. As this Court is well aware, the United States government for its own self preservation and the preservation of the Democratic countries of the world, is required to go forward with the construction, testing and firing of missiles of various types. The Court may take judicial notice of the fact that one of our most promising missiles--the one by means of which we propose to reach or approach the moon—is constructed in Huntsville, Alabama. It can only be put in operation at our established operating base, Cape Canaveral, Florida, and the only way this missile can move is by water. The impediment to navigation on the Tennessee River has retarded our progress, and therefore, if we risk losing the use of our navigable streams through incidents such as involved in the LEMBULUS matter, our national existence may be in jeopardy.

There can be no doubt that this Honorable Court is well aware of the activity of the Federal government in World War II, with particular reference to the construction of naval craft and other armament for the successful prosecution of that worldwide conflict. Hundreds of large naval craft such as submarines, destroyers and destroyer escorts were constructed on the Great Lakes and were towed to the open Gulf by some of the inland vessels represented by A.W.O. for active service. The biggest problem which had to be resolved in order that this program might be put into effect was the question of liability which might be incurred because of the method of bridge operation in the Chicago area.

The obstacles to this national defense program were finally overcome but the towing was at first undertaken by one operator only, namely, the Federal Barge Lines. The Federal Barge Lines at that time was a government-owned corporation and to protect these valuable navy vessels it was a self-insurer. The other lines at least in the beginning could not assume this risk primarily because of the Chicago bridge situation.

It is respectfully submitted that this clearly demonstrates that navigation throughout the United States should be free of impediment, and obligations should not be placed on vessel operators based on facts such as involved in the *Lembulus* matter.

THE NATIONAL TRANSPORTATION POLICY

This court has had presented to it on occasions too numerous to mention the obligation of the Government and of this court under Section 500 of the Transportation Act of 1920 (US Code, 49 USC Section 142), and the national transportation policy which strengthened the 1920 Act. The national transportation policy was enacted in 1940 as a preface to the Interstate Commerce Act (49 USC., preced-

ing Sections 1, 301, 901, and 1001). Section 500 of the 1920 Act requires government agencies, Federal courts and this Honorable Court "to promote, encourage and develop water transportation services and facilities in connection with the commerce of the United States, and to foster and preserve in full vigor both rail and water transportation". The national transportation policy referred to in essence imposes the same obligation and at the same time strengthens and reemphasizes the 1920 Act. These policies are paramount to the interests of any individual, corporation, or even a Sovereign State of the United States.

This court is too well aware of its findings in its decisions which clearly establish the paramount nature of our national transportation policy and the rights of vessel operators thereunder to quote even so much as one sentence from any of these decisions. Suffice it to cite on this point the leading cases establishing this doctrine. The first or most outstanding case is *Interstate Commerce Commission* v. *Mechling*, 330 U.S. 567 (1947). This was followed by a broadening of the application of the policy in *James McWilliams Blue Line* v. *United States*, 100 F. Supp. 66 (S.D.N.Y. 1951), *affirmed* 342 U.S. 951 (1952). This unbroken line of decisions continues with *Dixie Carriers* v. *United States*, 351 U.S. 56 (1956). Subsequent decisions of the lower courts and of this court have followed the same doctrine.

In view of the above, it is respectfully submitted that the instant proceeding is one which requires attention from this court not only as a matter of national defense but as a problem arising within the doctrine of our national transportation policy.

CONCLUSION

WHEREFORE, it is respectfully submitted that the petition for writ of certiorari should be granted.

Respectfully submitted,

/Sgd/ John H. Eisenhart, Jr.

JOHN H. EISENHART, JR.
Counsel for The American Waterways Operators, Inc.
Suite 318
1025 Conn. Ave., N. W.
Washington 6, D. C.

Dated at
Washington, D. C.
September 25, 1961.

Certificate of Service

This is to certify that I have today served three copies of this document on David D. Furman, Esq., Attorney General of New Jersey, State of New Jersey, State House Annex, Trenton, New Jersey and Robert M. Julian, Esq., Haight, Gardner, Poor & Havens, 80 Broad Street, New York, New York.

/Sgd/ John H. Eisenhart, Jr.

JOHN H. EISENHART, JR.

U. S. | JAMES R. BROWNING, Clerk

Supreme Court of the United States

OCTOBER TERM, 1961

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Petitioner,

—against—

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and

CANOLIUS V. HINES and
FRED W. BENTS

REPLY BRIEF OF PETITIONER, THE SHELL PETROLEUM CO., LTD., TO THE BRIEF IN OPPOSITION OF RESPONDENT CHARLES PESCHKEN

ROBERT M. JULIAN,
Counsel for Petitioner,
80 Broad Street,
New York 4, N. Y.

Supreme Court of the United States

OCTOBER TERM, 1961

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CANOLIUS V. HINES and FRED W. BENTS

No. 331

REPLY BRIEF OF PETITIONER, THE SHELL PETROLEUM CO., LTD., TO THE BRIEF IN OPPOSITION OF RESPONDENT CHARLES PESCHKEN

POINT 1.

THE STATE OF NEW JERSEY'S ASSERTION OF SOVEREIGN IMMUNITY, BY ITS ATTORNEY GENERAL, COUNSEL FOR THE RESPONDENT HEREIN, WHEN COUPLED WITH THE MANNER IN WHICH THE STATE OF NEW JERSEY MAINTAINS, OR, RATHER, FAILS TO MAINTAIN, BRIDGES USED IN COMMERCE CONSTITUTES AN UNREASONABLE RESTRAINT UPON INTERSTATE COMMERCE.

Respondent, through the Attorney General, argues that he cannot be held liable for the admitted defect in the lifting mechanism of the bridge because it is owned by the State of New Jersey (p. 16). It seems clear that if suit could have been brought against the State of New Jersey the State would have been held liable for, first, permitting

a bridge across a navigable stream to become defective and, second, for continuing to operate said bridge in a defective condition.

We thus have a situation where the State operates bridges throughout the entire State of New Jersey, and, under the doctrine of sovereign immunity, can do so in such a fashion as to create an unreasonable risk to those engaged in interstate commerce. The assertion of sovereign immunity makes it all the more important to review the acts or omissions of the bridge tender and the decision of the Court of Appeals as they relate to the acts and omissions of the State of New Jersey.

POINT II

RESPONDENT APPARENTLY AGREES THAT THERE IS A CONFLICT BETWEEN THE SECOND AND THIRD CIRCUITS.

Respondent urges (p. 35) that the decision in *Circle Line Sightseeing Yachts* v. *City of New York*, 283 F. 2d 811 (2 Cir., 1960) be ignored and restricted to its peculiar facts. It should be remembered that in that case 258 persons were aboard, 87 were injured, 32 persons—including 5 on stretchers—were taken to hospitals and one died.

We submit that this Court should not ignore a case illustrating the dangers resulting from lack of appropriate signals; a case that reveals the impact of a collision upon the welfare of 87 injured persons.

The Second Circuit stated (p. 814):

> "The failure to provide an adequate signal system was similarly negligence and a proximate cause of the collision. That Army regulations relating to the bridge do not require any warning system, other than an exchange of whistle signals with the boat seeking to pass, does not excuse the City's conduct * * *."

Respondent labels a simple two blast signal as a "warning" but it is interesting to note that nowhere in his brief does respondent discuss the State of New Jersey's bridge regulations which, in Rule 2, specify that a two blast signal is to be repeated at intervals (Exh. P 13e, 1f). Nor does respondent discuss the City of New York's regulations which provide that the two blast signal "shall be repeated until acknowledged by the boat." (13c).

It is obvious from the foregoing that a one two-blast signal is not a "warning" of danger; that both the State of New Jersey and the City of New York recognize that the Army regulations do not provide a specific warning or danger signal, and found it necessary to supplement the Army regulation by adopting their own type of signal holding give warning of imminent failure or potential failure naviga-

The Second Circuit was correct, we submit, in ho opening that the bridge tender must give specific warning to na tion of a danger existing on or in connection with one bridge a bridge. pondent.

In this case the State of New Jersey required the b signal. tender to sound a two blast signal repeatedly. Respon however, did not give that or any other warning sign .

POINT III.

ISSUES

ECTING,

RESPONDENT ATTEMPTS TO CLOUD THE ISS OF FACT OF LAW PRESENTED BY THE PETITION BY INJECT URT IN IN COUNTER-QUESTION NUMBER 2, QUESTIONS OF RE NOT WHICH WERE RESOLVED BY THE DISTRICT COUR THE PETITIONER'S FAVOR, AND WHICH WERE EVEN DISCUSSED BY THE COURT OF APPEALS.

e conclu-

The Court of Appeals unequivocally stated at the cor sion of its opinion: essary to s to pro-

> "Our view of the case makes it unnecessary decide at what point the vessel turned so as to

> ceed bow foremost downstream. It is also unnecessary for us to consider the disputed question of the speed of the LEMBULUS as she approached the bridge. Whether she was going fast or slow does not matter because she disobeyed the rule, whatever was her speed."

The decision of the Court of Appeals turned on one fact and one fact only, namely, that the bridge gave one two-blast signal and because of that signal the substantive rights of navigation were so obliterated that the entire onus of proceeding was transferred from the bridge to the vessel regardless of any other existing circumstances such as whether a ballasted tanker could be stopped under adverse weather conditions upon receipt of the signal.

Respondent's brief, while couched in somewhat different language, is essentially a rehash of argument of fact made to the District Court upon conclusion of the trial and repeated in support of a motion for a rehearing or for a new trial.

Every innuendo, every inference and every miasma urged upon the Trial Judge is repeated in opposition to this petition for a writ of certiorari, and, in addition, is replete with afterthoughts and misstatements.

Respondent's arguments and statements of alleged facts were all decided against him and have absolutely no relevance here and, furthermore, are inappropriately made to cloud the questions of law presented to this Court.

POINT IV.

ACCEPTANCE OF THE CONSTANT USE OF A TWO BLAST SIGNAL FOR WHAT IT IS, NAMELY, A MEANINGLESS SIGNAL, DOES NOT ESTABLISH A NEW PRINCIPLE OF LAW AS ARGUED BY RESPONDENT BUT IT IS IN REALITY A QUESTION OF FACT TO BE CONSIDERED BY THE TRIAL COURT WHEN APPLYING THE LAW.

The District Judge stated in his opinion, 184 F. Supp. 950, 956:

> "* * * In refraining from giving the required three-blast signal when the draw commenced to open, and in giving instead a two-blast signal Peschken said he was following his usual practice. * * *."

Mr. Peschken's actual testimony is as follows (a78):

> "Q. Now, you have testified, Mr. Peschken, that (193) you did not at the time of this accident give the three-blast signal on starting to open the span, and you also testified that instead you did in fact give a two-blast signal. Is that your customary procedure whenever you operate the drawbridge?
>
> A. Yes.
>
> Q. I couldn't hear your answer.
>
> A. It is.
>
> Q. So that there was nothing abnormal at all about your procedure in this particular case?
>
> A. Not a thing."

(a82):

> "Q. And rule 3 states, does it not, Mr. Peschken, 'On vertical bridges, three blasts of the siren are to be given (four blasts for Government craft) when the span starts to rise', and so on; is that not true, sir? (288) A. That's right.
>
> Q. And you testified that, in fact, you do not observe that regulation as a matter of course? A. That's right."

Respondent argues that the new principle of law (page 7) "is that the constant use of the two-blast signal by the bridge permits the vessel to ignore the warning of delay significance given that signal *by the regulations of the Secretary of the Army* (emphasis added) and permits the vessel to come ahead as if a three-blast signal had been given or as if no warning delay signal had been given."

The argument is unique in that it permits the bridge tender to customarily sound the wrong signal with impunity and yet hold a vessel liable by labeling that signal as a "warning" when, in practice, it was not used as a warning and when, in fact, a different warning signal was promulgated by the State Highway Department.

Respondent points out that the pilot aboard the LEMBULUS, Captain John Bassett, was dead and therefore it is not known whether he knew of the bridge tender's custom and whether he knew of the prior mechanical difficulty on the bridge. Respondent further argues that if Captain Bassett knew of the respondent's custom then he probably also knew of the mechanical difficulty on the bridge. The argument is untenable.

The practice of sounding the wrong signal is a custom prevalent throughout New York Harbor, as shown by New York City's rules on the subject (Appendix E) and by respondent's own testimony.

It is highly unlikely that Captain Bassett, who was so well known as a harbor pilot that his obituary was printed in the New York Times on April 28, 1959 (Appendix K, attached hereto), did not know of the custom.

On the other hand, there was only one mechanical failure of the bridge which apparently occurred during normal operations. The other failures were induced while trying to diagnose the trouble (79a-81a).

Under these circumstances it would be highly unreasonable to suppose that Captain Bassett had equal opportunity

to know both of the customs of the harbor and the fact that a specific bridge had had trouble on one occasion, especially when that trouble was not being publicized (81a).

A Court could very well find, under the authority of *McAllister* v. *United States*, 348 U. S. 19, that respondent's signal to the LEMBULUS was meaningless as a matter of fact.

To reiterate, the Court of Appeals for the Fourth Circuit in the *Majestic*, 80 F. 2d 879, page 881, treated a similar situation as a question of fact and affirmed the District Court.[1] The Third Circuit should have done the same in this case.

CONCLUSION

The petition should be granted

Respectfully submitted,

ROBERT M. JULIAN,
Counsel for Petitioner.

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[1]It appears that a principle of the law of procedure to be postulated from the *Clement*, *Monroe* and *Sightseer VIII* cases is that the bridge tender bears the burden of proving adequate warning to an approaching vessel of any danger to said vessel arising from the operation of the bridge. The respondent in this case failed to carry the burden of proof because he gave no warning at all other than his usual, customary meaningless signal and the District Court was correct in holding him liable.

NEW YORK TIMES

APRIL 28, 1959.

JOHN A. BASSETT, HARBOR PILOT, 63

Docking Guide With Moran Towing Dies—Saved Ship in Brooklyn Pier Fire

Capt. John A. Bassett

Capt. John A. Bassett of 1124 Banner Avenue, Brooklyn, a New York Harbor pilot with the Moran Towing and Transportation Company, Inc., died on Saturday at the United States Public Health Service Hospital at Richmond, S. I. He was 63 years old.

Captain Bassett played a key role on D-Day, June 6, 1944, when, on active duty with the Navy Construction Battalion, he had charge of towing many parts for artificial harbors from England to France, where they were set in place under very heavy enemy fire off Omaha Beach.

On Dec. 3, 1956, Captain Bassett was driving to his home, when he saw fire engines racing to the Luckenbach pier at the foot of Thirty-fifth Street, Brooklyn. He followed them onto the pier, where he was caught and injured by a heavy explosion.

Despite his injuries, he took the helm of the freighter African Grove, berthed at the next pier, and steered her into the safety of the harbor.

A native of Tampa, Fla., Captain Bassett started his career as an apprentice seaman on the three-masted schooner City of Tampa, which carried cedar logs from the West Indies to Pensacola, Fla. He later was a quartermaster on the Old Dominion Line steamer Monroe, plying between New York and Norfolk, Va.

Captain Bassett left that post to become a tugman in New York Harbor. He was a mate with the Card Towing Line, and later joined the Olsen Water and Towing Company, which was merged with Moran in 1950.

He leaves his wife, Nellie; three sons, Edward, Albert and Adam, and six grandchildren.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1961

No. 331

THE SHELL PETROLEUM CO., LTD.,
as owner of the m/s LEMBUCUS,
Petitioner,

v.

CHARLES PESCHKEN,
Respondent,

and

CANOLIUS V. HINES AND FRED W. BENTS.

OPPOSITION TO MOTIONS FOR LEAVE TO FILE *AMICUS CURIAE* BRIEFS

DAVID D. FURMAN,
Attorney General of New Jersey,
Attorney for Respondent, Charles Peschken,
State House Annex,
Trenton, New Jersey.

THEODORE I. BOTTER,
Assistant Attorney General,
Of Counsel.

Adams Press Corp., 11 Commerce Street, Newark, N. J.—Market 3-8611-12

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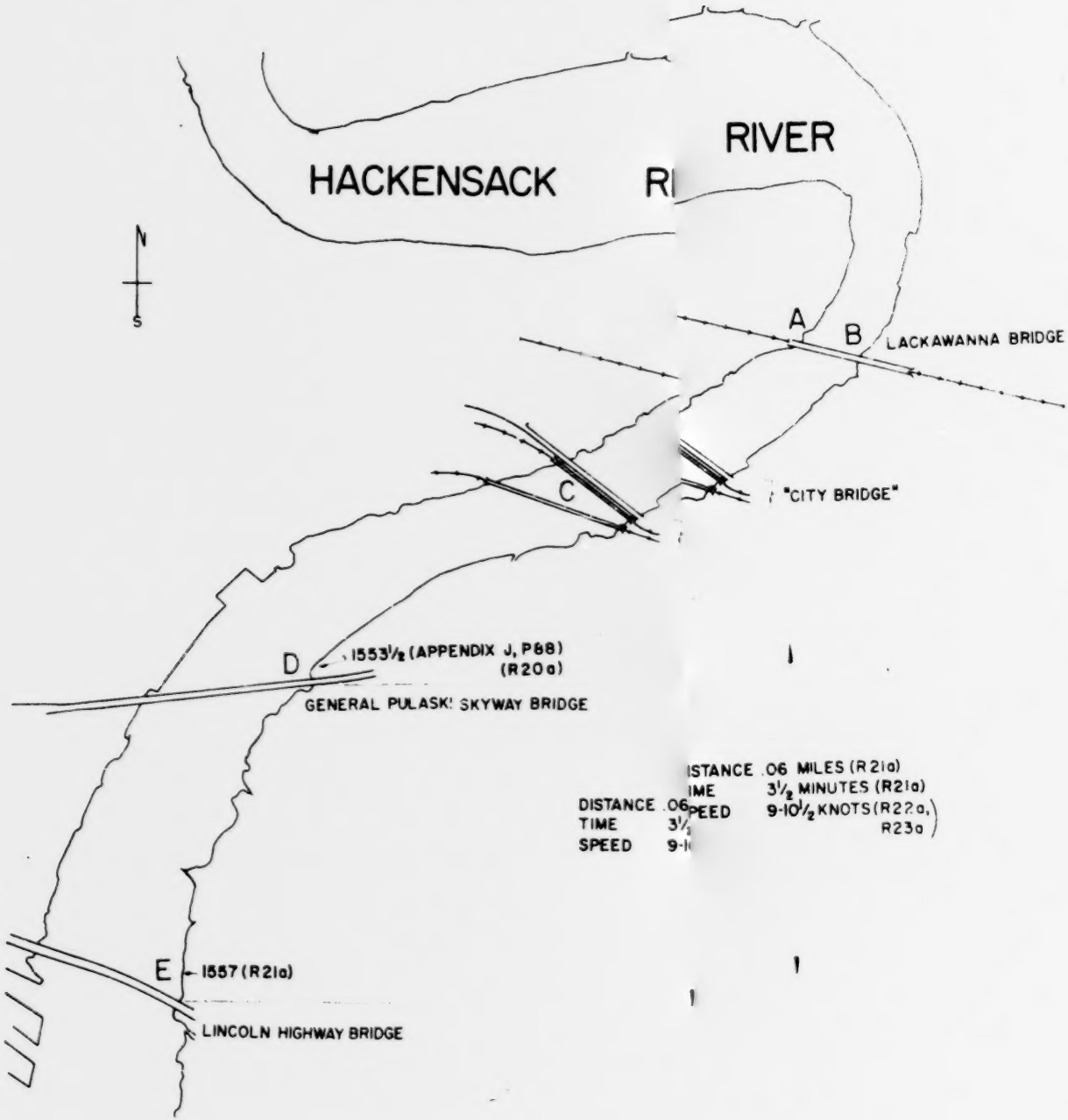
HACKENSACK
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N
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LINCOLN HIGHWAY BRIDGE

IN THE

Supreme Court of the United States

OCTOBER TERM, 1961

No. 331

THE SHELL PETROLEUM CO., LTD.,
as owner of the m/s LEMBULUS,

Petitioner,

against

CHARLES PESCHKEN,

Respondent,

and

CANOLIUS V. HINES and FRED W. BENTS

OPPOSITION TO MOTIONS FOR LEAVE TO FILE *AMICUS CURIAE* BRIEFS

To the Honorable, the Chief Justice of the United States and the Associate Justices of the Supreme Court of the United States:

The undersigned, David D. Furman, Attorney General of New Jersey, counsel for respondent, Charles Peschken, respectfully advises this Honorable Court of the reasons for objecting to the filing of briefs by Seaway Excursion Lines, Inc., and American Waterways Operators, Inc., as *amicus curiae*, and the reasons for withholding respondent's consent to the filing of such briefs.

Statement

Seaway Excursion Lines, Inc. and the American Waterways Operators, Inc., have each sought our consent to their filing briefs as *amicus curiae* in support of the petition for a writ of certiorari. Our consent was promptly refused. Their respective motions and proposed *amicus curiae* briefs followed. In essence both moving parties seek to advance their own special interests and to turn a specific trial involving one accident into a quasi-legislative investigation by the Supreme Court of other accidents and other conditions which may or may not exist at other times and places. No foundation in fact exists in the record of the case below for their contentions.

Seaway Excursion Lines, Inc. states that it has an appeal pending in the state courts of Ohio in a case that is apparently unreported. Although the facts in that case are not set forth in its brief here, it is assumed that Seaway Excursion Lines, Inc. operated a vessel that collided with a bridge somewhere in the United States. Its motion and brief here tell this court nothing about that case and nothing about the true facts of record in the case at hand. On the contrary, Seaway Excursion Lines, Inc. is under the mistaken impression that our case was tried on the theory that (a) warning signals were always given by the bridge tender, respondent Peschken, regardless of the possibility of delay in sufficiently opening the bridge to permit passage of the vessel and (b) that the master and pilot of the vessel, the Lembulus, were therefore justified in ignoring the warning signals from the bridge. The case was not tried on this theory and the facts of record do not support the assertion of this theory on appeal.

We do not know what conditions prevailed in the Ohio case involving Seaway Excursion Lines, Inc., nor whether Seaway Excursion Lines, Inc. has tried its case on the

theory now sought to be advanced. Similarly, the motion and brief of the American Waterways Operators, Inc. is based on a misconception of the facts of the Lembulus accident and of the theory on which the case was tried below. The record in the trial of this Lembulus accident case does not support either of the two bases for argument now urged upon this court.

In the first place, the Shell Petroleum Co. Ltd., owner of the Lembulus, did not contend that the two-blast warning signal was given by the bridge tender and could be justifiably ignored by the vessel. Shell contended that *no* warning signals were given by the bridge.[1] Moreover, in our brief in opposition to the petition, at page 8, we quoted from Shell's brief before the Court of Appeals in which Shell contended that "we doubt, however, that any blasts were given at all" from the bridge.

---

[1] Shell contended that the bridge tender did not give the two-blast warning signal, despite the fact that Shell produced no witnesses to deny that such warning signals were given. Shell produced only two witnesses. Captain Hawkins, Master of the Lembulus, testified that the vessel signalled the bridge of its approach at about 1553, when the vessel was "just about to pass under" the Pulaski Skyway and that in response to the three-blast signal from the vessel, "the bridge answered our signal and commenced lifting almost immediately" (R5a and R6a). Many witnesses testified that the answering signal from the bridge was a two-blast signal and this testimony was not contradicted by any of Shell's witnesses. Nevertheless, Shell contended at the trial level and before the Court of Appeals that the bridge failed to give the two-blast warning signal. This contention was based upon a self-serving report of the accident made by Captain Hawkins to Shell Tankers, Ltd. in London, which contained the ambiguous statement that, "They in turn answered with their signal indicating that they were in the process of lifting the bridge and, it was observed that they were in fact doing so" (R85a). However, the trial court rejected Shell's contention and found as a fact that the signal from the vessel "was acknowledged by the Highway bridge by 2 blasts of its horn (the prescribed warning of delay in opening of the draw) * * *" (R30a).

In the second place, there was no proof in the case below that when Captain Hawkins heard the two-blast signal he felt justified in disregarding it as a warning signal. The voyage on December 20, 1957 was the first trip Captain Hawkins made on the Hackensack River (R11a). He did not testify that he knew anything about the so-called practices of bridge tenders on the Hackensack River. In fact, Shell contended below that Captain Hawkins "shouldn't be expected to know" whether the bridge tender gave the two-blast or a three-blast signal because he was a "deep sea Master who cannot be expected to know local regulations."

Nor was any testimony given by the pilot of the Lembulus. Captain J. A. Bassett was not alive at the time of the trial. Nor were there any depositions of Captain Bassett to show whether or not he misinterpreted the warning signals from the bridge. Nor was there any evidence introduced to show the so-called prevailing practices on the Hackensack River, or on the East River, or the Chicago River, or on any other navigable waterway in the United States.

Thus, there are no facts in the record of this case to support the contentions now being made before this court.[2]

We do not believe that this court is the forum for a legislative inquiry into facts that do not appear of record in the case. If bridge tenders are not fairly complying with warning signal regulations, and if ship-bridge collisions are occurring because of this fact (conclusions which do not appear of record in this case) it may be appropriate for the Secretary of the Army to promulgate applicable regula-

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[2] This is as if an intersection automobile accident occurred in New Jersey and a car owner involved in an accident in Ohio were to come before this court and request that the New Jersey accident case be reviewed because someone in Ohio contends to have a prescriptive right to go through a stop-light with impunity.

tions or for a legislative committee to investigate the matter and to make appropriate legislative or regulatory recommendations. This course is not an appropriate one for the United States Supreme Court. Nor it is fair that new facts, not of record, now be alleged as a basis for urging this court to take an appeal.

The case below was tried on the assumption that the two-blast warning signal from the bridge was the appropriate warning signal. In fact, there was a stipulation by counsel with the court on this very point. In our brief in opposition to the petition for a writ of certiorari we quoted in a footnote, at pages 11 and 12, the stipulation to the effect that the rule concerning the use of two blasts as a warning signal (in case of difficulty or delay in getting the bridge open) was "the rule in effect on the date of this collision." Shell's counsel, F. E. P. McCarter, Esq., stated, "I don't think there is any question about that." Counsel for petitioner, Robert M. Julian, Esq., also participated in the trial, and did not take exception to this stipulation.

The trial court held that although the two-blast signal was given it was, in effect, countermanded by the commencement of the opening of the bridge. This rule of law has never been announced in any case which we have found or which has been called to our attention by opposing counsel, on the trial court or the appellate court levels. This novel theory would create complete chaos and uncertainty in the exchange of warning signals and would in effect unjustifiably repeal the regulations of the Secretary of the Army. This novel theory, invented by the trial court, was rejected by the Court of Appeals. This novel theory would deny a bridge tender the ability to give any warning signal at all. Obviously, if a bridge tender fears that there may be a delay in opening the bridge or that because of mechanical or electrical difficulties the bridge may not be promptly or fully opened to permit clearance of the vessel, he is

obliged to give a two-blast warning signal. But, under this novel theory of the District Court, he could not commence opening the bridge, for to do so would destroy the warning signal. This could result in the bow of the vessel actually colliding with the bridge and, possibly, sinking on the spot. Obviously, where there is the possibility of delay or difficulty in sufficiently opening the bridge to permit clearance, a bridge tender must be permitted to give the two-blast warning signal, and he must also be permitted to commence opening the bridge as best as possible under the circumstances. This, then, was the issue of law in the District Court and in the Court of Appeals.

The issues of fact in the District Court in this singular case were:

(a) Did the bridge give the two-blast warning signal?

(b) Did the bridge span stop during its ascent?

(c) Was the vessel going at an excessive speed?

(d) Did the Lembulus go through the Lackawanna Bridge stern-first or bow-first?

(e) Was Captain Hawkins unworthy of belief as to accuracy or veracity and did the conflicts and alterations in the records of the Lembulus discredit Shell's case?

There was no issue of fact as to what signals were usually given by Mr. Peschken or other bridge tenders on other occasions. As a matter of fact, Mr. McCarter, counsel for The Shell Petroleum Co. Ltd., objected to testimony by the bridge tender, Peschken, as to "the number of blasts that you usually give." The court sustained his objection saying, "We are interested in what was given this time" (R54a).

The testimony of Mr. Peschken on this point, quoted in part in the Appendix to our Brief in Opposition, R53a and 54a, is as follows:

"Q. I show you a copy of the rules that are issued by the Secretary of War, which state it was approved July 8, 1933, by George H. Dern. Can you identify that? A. I have seen that before.

"Q. You have seen these before. Do you know the rule about the sounding of the whistle as to the opening of a drawbridge? A. I do.

"Q. What is the number of blasts that you give on the whistle in the ordinary run to open a bridge, according to the rules? A. Well, the rules, I don't think, is listed in there.

"The Court: I didn't hear you.

"The Witness: I beg your pardon?

"The Court: I didn't hear you. I have to hear you because I have to decide this case. What did you say?

"The Witness: The rules today, we give two blasts.

"The Court: That is by way of acknowledgment of the signal given by the vessel?

"The Witness: The signal, and letting the vessel know—

"The Court: That it is okay to come ahead?

"The Witness: No, the bridge is not ready for opening immediately.

"The Court: Oh.

"The Witness: Due to traffic conditions.

"Q. I will read this part of the rule 4 on the reverse side of the page.

'In case of delay in opening the draw, as is provided for in these regulations, or as may be necessary by

accident to the machinery or other contingency, the signal from the vessel shall be answered by two long blasts of a whistle or horn from the bridge.'

Is that right? A. That's right, sir.

"Q. As the operator of the bridge, what is the number of blasts that you usually give?

"Mr. McCarter: I object to that; for what purpose, when, and so on.

"The Court: Yes.

"Mr. D'Auria: At any time, sir.

"Mr. McCarter: Under what circumstances?

"The Court: *We are interested in what was given this time. Objection sustained; go ahead.*" (Emphasis added.)

The specific reason for giving the two-blast signal at the time in question was testified to by Mr. Peschken as follows (R55a):

"Q. As soon as they saw the vessel, the Lembulus, what did you do? (280) A. I advised the two attendants to go down, get ready to close the gates. As soon as they got downstairs, I changed the traffic lights, pushed the button to change the traffic lights. When I seen the red light up, I gave them the signal to close the gates. Immediately after, I had the lights on the board that showed that the gates were all closed. We started to open the bridge. I blew the two blasts for the ship.

"The Court: Let me interrupt, if I may. You say you blew two blasts from the bridge as a signal to the ship, is that right?

"The Witness: That's right.

"The Court: And what purpose were those two blasts blown for?

"The Witness: Possibility of a delay.
"The Court: Possibility of delay. Go ahead."

Shell asserts on this appeal that Mr. Peschken violated the State Highway Department rules (Appendix F) in the operation of the bridge. Rule 2 of the State Highway Department provides that: "If opening is delayed abnormally due to traffic conditions or to failure of equipment, the signal of two blasts is to be repeated at intervals *until the draw can be moved.*" (Emphasis added; P55a.) This rule was cited in the opinion of the District Court (P28a). But this rule did not apply for several reasons. The draw *could be moved*, and, therefore, the rule did not require the warning signal to be repeated at intervals. Moreover, the trial court held in its letter opinion (Appendix B, P44a) that the Highway Department regulations did not apply and that, "There is no evidence that the master of the vessel or her pilot had knowledge either of the defect or of the regulations adopted by the Highway Department with regard to the giving of warning signals, and therefore the vessel was entitled to rely upon the regulations promulgated by the Secretary of the Army which I have quoted in my filed opinion."

Thus, there is no merit to the contention made by petitioner and the moving parties. The bridge span could be moved. However, there was the possibility of delay due to mechanical or electrical defects. As such, the bridge tender gave the proper warning signal to the vessel. There is no proof in the record that the master or pilot of the vessel did not feel bound by federal regulations. The case, in fact, was tried on the principle that those regulations were controlling. Therefore, the vessel was guilty of violating the controlling regulations and was negligent in not heeding the warning signals. The holding of the Court of Appeals is clearly correct and conforms to long established principles of law.

> In any case, the decision below in favor of respondent, Peschken, can be sustained on other grounds than the holding as a matter of law made by the Court of Appeals. Thus, we contend that this court ought not grant certiorari. The District Court found as a fact that the vessel was going at full harbor speed ahead (9 knots) for six minutes from 1547½ to 1553⅓ (P42a). The trial court found that the average speed of the vessel for the distance of 1.1 nautical miles before reaching the Highway bridge was 7.33 knots (P32a). The trial court further found that, "The Captain of the Lembulus, however, admitted that her average speed between the Skyway and the Lincoln Highway bridge was 9 knots" (P32a).

bridge was 9 knots" (P32a).

We maintain that average speeds of 7.33 knots or 9 knots for the short distance before reaching the Highway bridge are clearly excessive speeds. That these speeds were excessive is obvious. Respondent's expert testified that the maximum safe speed for a vessel travelling between Koppers Wharf and the Lincoln Highway bridge would be 3½ to 4 knots (P33a). Captain Hawkins himself testified that the Lembulus maintains steerage-way under the conditions that existed at a speed of 3.42 knots (R22a). The only evidence fixing the time and positions of the vessel between the point just north of the Pulaski Skyway, at 1553½, and the Lincoln Highway bridge, at 1557, came from Captain Hawkins *on his direct testimony.* (See the sketch included at page i, above.) A vessel travelling the distance between those two points, approximately .6 nautical miles, in 3½ minutes, as a matter of mathematical truth must be travelling at over 9 knots. This is almost the speed that the Lembulus could attain in the open ocean, as admitted by Captain Hawkins. His testimony on this point is as follows (R23a, 24a):

"*Recross examination by Mr. D'Auria*:

> "Q. So we can safely say in 3½ minutes that the Lembulus was doing north of the Skyway to the Lin-

coln Highway between nine and 10.20 knots? A. Yes.

"Q. Which is almost the speed you would do in the open ocean, isn't that right? A. Yes.

"Mr. D'Auria: No further questions."

On the basis of this record we cannot understand how the American Waterways Operators, Inc. can come to the support of the Lembulus in this case. We understand that the Moran Towing Company, whose tugs and pilot were responsible for bringing the Lembulus down the Hackensack River, has one or more corporations that are members of the trade association, the American Waterways Operators, Inc. We understand also that perhaps the owner of the Lembulus, The Shell Petroleum Co. Ltd., has an affiliate or subsidiary company that may be a member of the same trade association. But we respectfully suggest that the monetary loss through the damage to two masts of the Lembulus was not so great in the case at hand to justify the extreme effort which is being made to obtain a money judgment against the bridge tender, Peschken.[3]

We respectfully submit that these extreme measures, taken to suggest that this case is of national importance, are entirely unwarranted. Important or not, the holding of the Court of Appeals below merely continues sound law on this subject. The holding is that where a vessel disregards a two-blast warning signal given by a bridge tender because of electrical trouble on the bridge, the vessel cannot

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[3] This effort includes Appendix K of petitioner's Reply Brief, a reprint of a New York Times obituary about Captain John A. Bassett. This was not in evidence in the case below. Why is it introduced without permission at this final, last gasp, Reply Brief stage? Should we now be allowed to challenge the suggested expert qualifications of Captain Bassett, by showing the charges recommended against him for ramming another vessel before his death and for the failure to give proper warning signals on another occasion?

recover for damages inflicted when it runs into a bridge-span that has not yet fully opened (and which may have stopped in its ascent due to such electrical trouble). Is there anything so alarming in this holding that calls for correction by this court? We respectfully submit that this is good, sound, sensible law which should not be disturbed.

ARGUMENT

POINT I

The decision of the Court of Appeals is not in con-

Excursion Lines, Inc. and the American Waterways Operators, Inc. both assert that there is uncertainty and conflict in the decisions concerning the exchange of warning signals between a bridge and a vessel. We have demonstrated in our brief in opposition to the petition for certiorari that no such conflict exists. Our opposing parties have not called to this Court's attention one case in which a bridge operator or owner was held liable after giving a vessel the warning signal required by applicable regulations.

At page 5 of its proposed brief as *amicus curiae*, the American Waterways Operators, Inc. refers to *The Eureka*, 80 F. 2d 303 (9th Cir. 1935) and alleges that the decision of the Third Circuit Court in the case at bar is "conflicting" with the decision in *The Eureka*. Also relied upon as a basis for the alleged conflict is the case of *Circle Line Sightseeing Yachts* v. *City of New York*, 283 F. 2d 811 (2 Cir. 1960), cert. den. 365 U. S. 879 (1961). These cases will be dealt with below to demonstrate that petitioner and its supporters are grasping at straws and are misstating the principles of law in the respective cases.

In *The Eureka, supra*, a vessel, the Eureka, signaled [illegible], signaled for a bridge to open, giving a signal of one long and two sh[illegible]and two short blasts. The bridge tender signaled to the vessel to proc[illegible]el to proceed *and gave no warning signal.* The Court stated at [illegible]stated at 304, "That no warning signal was given by the bridge ten[illegible]bridge tender after he had signaled the Eureka to proceed is admitte[illegible]is admitted." The accident was caused because the west leaf of the dr[illegible]f of the draw-bridge opened promptly but, "because of some defect[illegible]ome defect in the control mechanism, the east leaf could not be raise[illegible]ot be raised" (at 304). The Court stated at 304, that, "The only qu[illegible]he only question as to the negligence of the bridge tender is as[illegible]ider is as to whether or not it was his duty to give some danger[illegible]langer signal operator knew something was wrong but acted on [illegible] sumption that he could overcome the difficulty in ti[illegible]bridge allow the Eureka to pass safely, hence he gave no d[illegible]the as-signal, although provided with a whistle-operated by[illegible]time to pressed air which could be used for that purpose"[illegible]danger Court held that under the circumstances, a danger [illegible]by com-"could and should have been given instantly" (at[illegible]". The citing *Clement* v. *Metropolitan West Side El. R. Co*[illegible]r signal F. 271 (7 Cir. 1903) and *Munroe* v. *City of Chicago*,[illegible]at 306), 936 (7 Cir. 1912), cert. den., 229 U. S. 609 (1913). The[illegible]*Co.*, 123 two leading cases which are referred to in our Brief[illegible]. 194 F. position. The Court held that "the situation confronti[illegible]hese are bridge operator * * * called for the danger signal,[illegible]f in Op-was given, and this failure was an act of negligen[illegible]nting the 306). The holding in *The Eureka* is entirely consisten[illegible]l. None the holding of the Court of Appeals in the case a[illegible]nce (at Here, of course, a danger signal was given.[illegible]nt with at bar.

In *Circle Line Sightseeing Yachts, Inc.* v. *City of York*, 283 F. 2d 811 (1960), the court held the *City o*[illegible]*of New York* liable for failing "to devise an effective mea[illegible]*of New* warning approaching ships of the prospective openi[illegible]eans of [illegible]ning of

the bridge" (283 F. 2d at 813). In this case, the sightseeing vessel was so low-built as to be capable of passing under the bridge *while it was closed*, but the bridge contained low-hanging projections which could collide with the boat if the bridge were to open while the boat was attempting to pass under it. The court held the city liable, saying that, "Thus, instead of developing an adequate signal system to warn approaching boats, the City depended upon the bridge operator to watch for such boats and to delay opening the bridge if they were too close" (at 813). The court held that the operator's failure to make any effort to protect the sightseeing vessel was the proximate cause of the collision. The court added that "The failure to provide an adequate signal system was similarly negligence and a proximate cause of the collision."

That case is distinguished from the case at bar by its unusual circumstances, namely, that the bridge was *required* to give a *warning signal* to the sightseeing vessel only when the bridge *was to be opened*. Moreover, it was the *failure to give the vessel a warning signal* which was the proximate cause of the collision of the sightseeing boat with the bridge. Lastly, holding the bridge owner liable for failing to provide an adequate warning signal system is entirely irrelevant to the case at bar. Here, the owner of the bridge, the State Highway Department, is not a party defendant. As to the negligence of the bridge operator, in the *Circle Line Sightseeing* case, the court held, at 814, that the bridge operator had no right to fail to observe the course of the vessel and, in fact, should not have commenced opening the bridge when he saw the course the vessel was taking. (It was the *opening* of the bridge which caused the accident.) This circumstance is entirely irrelevant to the case at bar.

The court in *Circle* commented upon the Army regulations requiring an exchange of whistle signals between the

boat and the bridge. The court held that the Army regulations did not require a warning system under the circumstances, apparently meaning that the regulations did not require the bridge to give a *warning* that the bridge *was being opened*. (The Army regulations controlling the case at bar requires a warning signal in case of delay or inability to open the bridge.) The court in *Circle Line Sightseeing* refers to a Ninth Circuit case requiring an additional signal light to warn of danger, "in cases where the regular light went dead" (at 814). Again, this is quite different from the case at bar. Here adequate warning signals existed on the bridge and were used by the bridge tender, Peschken.

The court in *Circle Line Sightseeing* also discussed the alleged violation of the Narrow Channel rule by the sightseeing vessel. This rule requires a vessel to keep to the starboard side "when it is safe and practicable". The court then held, at 814, "While custom alone does not justify departure from the important Narrow Channel Rule, these *peculiar and quite temporary circumstances* support a finding that adherence to the rule here was not 'safe and practicable.'" (Emphasis added.) Thus did the Second Circuit reaffirm the importance of strictly complying with navigation rules, noting that the applicable rule itself contained an exception in cases where keeping to the starboard side is not "safe and practicable".

Applying these concepts to the case at bar, we contend that there was no justification for the Lembulus' failure to heed the two-blast warning signal. If a principle of law is adopted which gives a vessel an option to heed or disregard the warning signal from a bridge, the regulations of the Secretary of the Army would be voided and the entire warning system destroyed. There would be no warning signal available. Bridge tenders would become absolute guarantors of a vessel's safety even when the vessel proceeds against a warning signal.

POINT II

There is no showing that petitioner, the Shell Petroleum Co. Ltd., has inadequately presented its petition to this Court.

The motions and proposed briefs of Excursion Lines, Inc. and American Waterways Operators, Inc. add nothing new to the petition submitted by Shell Petroleum Co. Ltd., except that the case of *The Eureka, supra*, is, inappropriately, cited in the proposed *amicus curiae* brief of the American Waterways Operators, Inc. In fact, the respective motions show considerable unfamiliarity with the details of the case at bar. This is to be expected. The moving parties did not participate in the trial. Petitioner's appendix contains only two of the numerous exhibits introduced at the trial and contains twenty pages of excerpts from testimony in a case where the testimony of all witnesses printed by respondent below before the Circuit Court of Appeals ran over two hundred and twenty pages in length.

The Shell Petroleum Co. Ltd. is in a position to present its case without the aid of outsiders. Robert M. Julian, Esq., of 80 Broad Street, New York, New York, who here appears as counsel for the petitioner, participated in the trial as co-proctor for libellant along with the New Jersey firm of McCarter & English, Esqs. Mr. Julian is associated with the firm of Haight, Gardner, Poor & Havens, Esq., of 80 Broad Street, New York City, as appears in Appendix I of the petition, P87a. In fact, Shell's legal representatives were called in on the accident shortly after its occurrence. The letter of Captain Hawkins purportedly written on September 21, 1957, one day after the accident, reproduced in Appendix I of the petition, shows that a copy was sent to Mr. Julian as representative from Messrs. Haight, Gardner, Poor & Havens (P84a, P87a). This shows that Mr. Julian was in on the case right from the start. Captain

Hawkins testified (R12a) that legal representatives of the ship's owner came down while the ship was in the Bethlehem Steel Yard "and took statements from various members of the crew."

Rather than assist the Court in determining whether certiorari should be granted, the moving parties are simply confusing the issues. They are seeking to try the case on one theory in the United States Supreme Court when it was tried on an entirely different theory in the District Court. They are seeking to assert that a two-blast warning signal was not the proper warning signal at the time of the accident when counsel for Shell stipulated at the trial that it was the required warning signal under applicable regulations. Without a basis in the record, they are making allegations of various practices in different parts of the country when counsel for Shell during the trial objected to testimony as to the "usual" signal given by the bridge operator on other occasions. This objection was upheld by the trial court on the theory that the case concerned only the specific signals that were exchanged at the time of the specific accident here involved.

CONCLUSION

We respectfully submit, therefore, that there is no conflict in the case law which justifies an appeal to the United States Supreme Court. Nor is there any showing that counsel for The Shell Petroleum Co. Ltd. is not capable of adequately presenting its petition for certiorari without assistance from the parties seeking to file briefs as *amicus curiae*. We respectfully submit that the motions for leave to file such briefs should be denied.

Respectfully submitted,

DAVID D. FURMAN,
Attorney General of
New Jersey,
Counsel for Respondent,
Charles Peschken.

THEODORE I. BOTTER,
Assistant Attorney General,
Of Counsel.